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In the Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-781

FRITZ SCHERK,

Petitioner,

v.

ALBERTO-CULVER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 71 C 1414

ALBERTO-CULVER COMPANY,

Plaintiff,

v.

FRITZ SCHERK,

Defendant.

RELEVANT DOCKET ENTRIES

1971

June 11. Filed complaint with exhibits attached . . . .

Aug. 31. Filed defendant's motion to dismiss or alternatively to stay.

Nov. 22. Filed motion for preliminary injunction restraining prosecution of arbitration.

Nov. 24. Enter order of preliminary injunction enjoining the defendant Fritz Scherk from further prosecuting the arbitration proceeding before the Court of Arbitration of the International Chamber of Commerce pending decision of this Court as to its jurisdiction-DRAFT-Order Plaintiff's bond set at $5,000.00—Lynch, J.

Dec. 22. Enter order denying defendant's motion to dismiss or alternatively to stay—Lynch, J.

1972

Jan. 7. Filed defendant's motion to amend order of December 22, 1971.

Jan. 12. Plaintiff motion for renewed preliminary injunction is entered and continued; defendant is given five days to reply—Lynch, J.

Relevant Docket Entries

Jan. 14. Enter order granting defendant's motion for certification to the Circuit Court of Appeals pursuant to 28 U.S.C. sec. 1292(b). Enter order of preliminary injunction pursuant to the terms of the draft order entered herein (Draft). Enter order approving preliminary injunction bond in the amount of $7,500.00 (Draft)—Lynch, J.

Jan. 14. Enter order granting defendant's motion for certification to court of appeals. Enter injunction enjoining the parties from proceeding—Lynch, J.

Jan. 17. Filed memorandum of decision.

Jan. 18. Enter amended order (Draft)—Lynch, J.

Jan. 21. Filed defendant's notice of appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ALBERTO-CULVER COMPANY,

Plaintiff-Appellee,

v.

FRITZ SCHERK,

Defendant-Appellant.

RELEVANT DOCKET ENTRIES

1972

Mar. 1. Filed original record on appeal.

1973

Aug. 2. Entered judgment order AFFIRMING, with costs. Opinion by Judge Gordon. Judge Stevens dissenting.

Aug. 16. Filed 25 copies of petition for rehearing and suggestion for rehearing en banc—service.

Oct. 18. Entered order denying petition for rehearing.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.
(Title omitted in printing.)

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION, RESCISSION AND OTHER RELIEF

(Filed June 11, 1971.)

The plaintiff, Alberto-Culver Company, for its Complaint against defendant Fritz Scherk, alleges that:

COUNT I

1. The plaintiff pleads this Count I to enforce liabilities created by Section 10 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78j, and rule 10b-5 promulgated thereunder. The Court's jurisdiction is based upon Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78aa.

2. Certain of the acts and transactions constituting the violations complained of herein have occurred within the jurisdiction of the United States District Court for the Northern District of Illinois, Eastern Division.

3. Prior to March 15, 1969 the defendant Scherk owned all of the outstanding securities of a Liechtenstein corporation, Scherk Enterprises V. Aktiengesellshaft (formerly known as Scherk Establissement Vaduz and hereinafter called "SEV") and all outstanding securities of a German corporation, Lodeva Herstellung und Vertrieb

Kosmetischer Artikel GMBH (hereinafter called "Lodeva"). Scherk was also the sole proprietor of a business called Firma Ludwig Scherk (hereinafter called "FLS"), located in Berlin, Germany.

4. Between July 1, 1967 and March 15, 1969 the plaintiff and the defendant engaged in extensive negotiations in Illinois and elsewhere for the acquisition by plaintiff from defendant of all of the outstanding securities of SEV and of Lodeva and all of the assets, with certain specified exceptions, of FLS, including trademarks purportedly owned by the defendant and the acquired businesses. On or about February 11, 1969 and February 12, 1969, as a result of these negotiations, the plaintiff and the defendant entered into and executed four (4) written agreements as follows:

(a) An Agreement for the acquisition by plaintiff from defendant of all the outstanding securities of SEV.

(b) An Agreement for the acquisition by plaintiff from defendant of all of the defendant's outstanding securities of Lodeva.

(c) An Agreement for the acquisition by plaintiff from defendant of all of the assets, with certain specified exceptions, of FLS.

(d) A Consulting Agreement, ancillary to the other three Agreements, under which defendant undertook for an agreed consideration to render services to plaintiff and to refrain from competition with plaintiff under specified conditions.

Copies of the four Agreements (hereinafter collectively referred to as "the Agreements") are attached hereto as Exhibits 1 through 4, respectively.

5. During the course of the negotiations leading to the execution of the Agreements and in connection with the purchase by the plaintiff of all of the outstanding securi-

ties of SEV and of Lodeva and the assets of FLS the defendant and his authorized agents by the use of the means or instrumentalities of interstate commerce or of the mails, including interstate telephone calls, telegrams and travel into Illinois, employed devices, schemes or artifices to defraud, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading, and engaged in acts, practices or courses of business which operated as a fraud or deceit upon the plaintiff.

6. As part of the devices, schemes or artifices to defraud, the untrue statements and omissions of material fact, and the acts, practices and courses of business which operated as a fraud or deceit, the defendant and his authorized agents with the intent to induce plaintiff to act thereon and with the intent to deceive and defraud made representations concerning the character, nature, validity and value of trademarks purportedly owned by defendant and the acquired businesses notwithstanding that they knew or should have known that the representations were false and misleading.

7. The false and misleading representations made by the defendant and his authorized agents included the following:

(a) On or about November 15, 1968 the defendant's American attorney, who was expressly authorized by defendant to represent defendant in the negotiations, sent to counsel for the plaintiff in Chicago a telegram stating that with respect to certain trademarks "owned by omission SEV omission SEV omission will have good and merchantable title to all such registrations and to the best of their knowledge information and belief all such marks free and clear of

any charges or claims no actions omission pending anain st ill (sic) threatened with respect to said titles to any such marks all registrations stop rest O.K. stop omissions."

(b) On or about November 26, 1968 the defendant's American attorney, in a letter sent to plaintiff's counsel in Chicago, stated that "we would of course be willing to add what I mentioned this afternoon, namely, that no litigation is pending, or, to our knowledge, threatened against Scherk's trademarks, and that the adverse claims, if any, informally made are not such as to materially affect the value of the trademark rights of Scherk's."

(c) On or about December 8, 1968 the defendant's American attorney, during the course of negotiations in Chicago, Illinois, stated to plaintiff's Vice President and to plaintiff's trademark counsel that he had checked with those persons connected with defendant who were familiar with the trademarks and had ascertained that with respect to the trademarks there were no restrictive agreements and no opposition or legal proceedings or litigation, either past, pending or threatened.

(d) Both the FLS and SEV Agreements contain the following representations and express warranties:

"3.6(d) Seller warrants that he has full exclusive and unencumbered title in and to all national and international trademark registrations set forth in Exhibit TM-3, and that said national registrations are presently in full force and effect in the countries to which they pertain, and that said international registrations are presently in full force and effect in all countries (except countries included in Group W) adhering to the Arrangement of Madrid for the Inter-

national Registration of Trademarks, as amended, except to the extent, if any, shown on the BIRPPI status reports set forth in Exhibit TM-X and that subject to the agreements with Tarsia GMBH set forth in Exhibits TM-3A, TM-3B, TM-3C, TM-3D and TM-3E he has full exclusive and unencumbered title to the trademarks SCHERK, TARR, LARA, FJORD and variants thereof in those of the following countries in which as shown in Exhibit TM-3 said trademarks are respectively registered: Austria, Finland, Germany, Greece, Holland, Italy, Liechtenstein, Switzerland, Turkey and the United Kingdom.

(e) With respect to the countries referred to in Exhibits TM-1A, TM-1B, TM-2 and TM-3 (hereinafter referred to as "Group F" countries), Seller warrants that there are no legal or administrative actions or other adverse claims pending or to his knowledge threatened against any of the trademarks or pending applications or registrations set forth in said Exhibits, except as noted in Exhibit TM-4. Seller further warrants that there are presently pending no legal or administrative actions or asserted claims against any third parties based upon his rights in any of the trademarks or pending applications or registrations set forth in said Exhibits except as noted in Exhibit TM-4(1).

(h) Seller warrants in and for those Group F countries requiring actual use of a trademark within prescribed periods subsequent to its registration (hereinafter referred to as POST USER COUNTRIES), that the trademarks SCHERK, TARR, LARA and FJORD and variants thereof have been in fact duly and lawfully used in said POST USER COUNTRIES during the respective prescribed statutory periods .... except as to those trademarks in those countries set forth in Exhibit TM-5."

(e) At no time during the negotiations in Illinois and elsewhere did the defendant disclose that the character, nature, validity and value of the trade-

marks were impaired by numerous defects, including restrictive agreements between defendant and third parties, numerous past and pending legal proceedings affecting the trademarks brought both by and against the defendant, and his failure to use the trademarks in countries requiring actual use within a prescribed statutory period, although such disclosures were necessary in order to make the statements by the defendant, in light of the circumstances under which they were made, not misleading. Some of these defects are set forth in detail in the letter dated April 6, 1970, to plaintiff from the law firm of Pattishall, McAuliffe & Hofstetter attached hereto as Exhibit 5. Each of these defects was known to the defendant and his agents at the time of representations and express warranties were made.

8. All of the above representations and express warranties were material to plaintiff. Relying on the representations and express warranties and believing them to be true, plaintiff purchased from the defendant all of the outstanding securities of SEV and of Lodeva and the assets of FLS, executed the Agreements in Illinois and paid to defendant thereunder in excess of $615,000. Under the SEV Agreement plaintiff also executed in Illinois and delivered to defendant promissory notes (hereinafter called "the Notes") in the aggregate principal amount of $800,000 and prescribing the payment of interest and principal at intervals specified in the Notes.

9. An actual controversy exists between the parties. After discovery of the fraudulent representations and omissions plaintiff notified defendant thereof and further informed defendant that, by reason of such fraudulent representations and omissions, plaintiff notified defendant

that plaintiff was rescinding the Agreements. On numerous occasions plaintiff has demanded that defendant proceed with the rescission of the Agreements and make plaintiff whole for all sums paid and losses incurred by plaintiff as a result of defendant's fraudulent representations, omissions and breaches of warranty.

10. Although defendant has stated, in correspondence and in meetings in Chicago, Illinois, that the Agreements should be rescinded, defendant has wholly failed and refused to pay to plaintiff those sums necessary to make plaintiff whole but has, on the contrary, unreasonably and vexatiously withheld such payment, and has stated that he is without sufficient funds to make such payment, thereby compelling plaintiff to continue to advance additional capital to the SEV, Lodeva and FLS businesses in order to maintain them as viable entities.

11. In addition to the more than $615,000 paid to defendant under the Agreements, plaintiff has sustained losses and incurred expenses in the sum of One Million Two Hundred Thousand Dollars ($1,200,000) in connection with the Agreements and in discovery of the defendant's fraud and breaches of warranty, including advances of capital to SEV, Lodeva and FLS, interest, travel expense, legal and accounting fees, and services of company personnel.

12. Plaintiff stands ready to retransfer to defendant the properties acquired by plaintiff upon payment by defendant of those sums necessary to make plaintiff whole.

13. The FLS, SEV and Consulting Agreements contain a provision purporting to require resort to arbitration before the International Chamber of Commerce with respect to any controversy or claim which shall arise out

of such Agreements or the breach thereof. Defendant has threatened to institute such arbitration proceedings or other litigation against plaintiff.

Wherefore, plaintiff prays that the Court:

1. Enter a declaratory judgment declaring the Agreements and each of them, and all agreements ancillary thereto and connected therewith, rescinded and cancelled and relieving plaintiff of all further obligation thereunder.

2. Enter a declaratory judgment declaring the Notes null, void and unenforceable.

3. Enter judgment against the defendant in the amount of One Million Eight Hundred Fifteen Thousand and no/100 Dollars ($1,815,000.00) as compensatory damages.

4. Enter judgment against the defendant in the further amount of Two Hundred Thousand and no/100 Dollars ($200,000.00) as exemplary damages to punish the defendant for his fraud and to deter such conduct in the future.

5. Enjoin and restrain the defendant, during the pendency of these proceedings and permanently, from instituting or prosecuting arbitration proceedings against plaintiff and from instituting or prosecuting litigation against plaintiff in any other forum or tribunal.

6. Require the defendant to pay all costs incurred in these proceedings and in connection with any retransfer of property or implementation of the rescission.

7. Grant such other or further relief as may be appropriate.

COUNT II

1. The plaintiff pleads this Count II to enforce common law liability for fraud and deceit and for breach of express warranties.

2. The plaintiff is a corporation duly organized and existing under the laws of the State of Delaware and has its principal place of business in the State of Illinois.

3. The defendant Fritz Scherk is a citizen of either Germany or Switzerland and resides in Geneva, Switzerland.

4. The amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000) exclusive of interest and costs. The Court's jurisdiction of the matter complained of in this Court is therefore based on 28 U.S.C. §1332 as well as the principles of pendent jurisdiction.

5. The plaintiff realleges paragraphs 1 through 8 of Count I as though fully set forth herein.

6. During the course of the negotiations leading to the execution of the Agreements and in the Agreements themselves the defendant Scherk and his authorized agents, in the State of Illinois and elsewhere, made false and fraudulent representations of material fact and false and fraudulent express warranties to the plaintiff concerning the character, nature, validity and value of trademarks purportedly owned by defendant. Such representations and warranties were made by defendant and his agents with knowledge of their falsity and with the intent to induce plaintiff to act thereon and with the intent to deceive and defraud the plaintiff. Relying on the false and fraudulent representations of material fact and the false and fraudulent express warranties and believing them to be true, the plaintiff purchased from the defendant all of the outstanding securities of SEV and of Lodeva and the assets of FLS, executed the Agreements and paid to defendant thereunder in excess of $615,000. Under the SEV Agreement plaintiff also executed and delivered to defendant

promissory notes (hereinafter called "the Notes") in the aggregate principal amount of $800,000 and prescribing the payment of interest and principal at intervals specified in the Notes.

7. The plaintiff realleges paragraphs 9 through 13 of Count I as though fully set forth herein.

Wherefore, plaintiff prays that the Court:

1. Enter a declaratory judgment declaring the Agreements and each of them, and all agreements ancillary thereto or connected therewith, rescinded and cancelled and relieving plaintiff of all further obligation thereunder.

2. Enter a declaratory judgment declaring the Notes null, void and unenforceable.

3. Enter judgment against the defendant in the amount of One Million Eight Hundred Fifteen Thousand and no/100 Dollars ($1,815,000.00) as compensatory damages.

4. Enter judgment against the defendant in the further amount of Two Hundred Thousand and no/100 Dollars ($200,000.00) as exemplary damages to punish the defendant for his fraud and to deter such conduct in the future.

5. Enjoin and restrain the defendant, during the pendency of these proceedings and permanently, from instituting or prosecuting arbitration proceedings against plaintiff and from instituting or prosecuting litigation against plaintiff in any other forum or tribunal.

6. Require the defendant to pay all costs incurred in these proceedings and in connection with any retransfer of property or implementation of the rescission.

7. Grant such other or further relief as may be appropriate.

COUNT III

1. The plaintiff adopts and realleges paragraphs 1 through 8 of Count I and paragraphs 1 through 7 of Count II as though fully set forth herein.

2. Plaintiff pleads this Count III as an alternative claim in the event that the Court finds that the rescission and other relief requested in Counts I and II are for any reason unavailable.

3. The difference between the character, nature, validity and value of the trademarks as represented and warranted and the character, nature, validity and value of the trademarks as they in fact were discovered to be is so substantial and so material as to result in a total failure of consideration with respect to such trademarks. As a proximate result of the defendant's false and misleading statements and omissions and the false and fraudulent representations of material fact and false and fraudulent express warranties the plaintiff has sustained loss and damage in an amount not less than One Million Three Hundred Thousand Dollars ($1,300,000) through such impairment of the trademarks and additional damages in the amount of not less than Three Hundred Thousand Dollars ($300,000) in (a) investigating and discovering defendant's fraud and breaches of warranty, (b) legal and other costs incident to the defense and prosecution of the legal proceedings affecting the trademarks, (c) lost profits of FLS and SEV, (d) obsolete inventory and uncollectible accounts receivable which defendant warranted in the Agreements to be saleable and collectible, and (e) defendant's improper withdrawals of funds from the businesses.

Wherefore, plaintiff prays that the Court, as an alternative to the relief prayed for in Count I:

1. Enter a declaratory judgment declaring the Notes null, void and unenforceable.

2. Enter judgment against the defendant in the amount of Eight Hundred Thousand Dollars ($800,000) as compensatory damages.

3. Enter judgment against the defendant in the further amount of Two Hundred Thousand Dollars ($200,000) as exemplary damages to punish the defendant for his fraud and to deter such conduct in the future.

4. Enjoin and restrain the defendant, during the pendency of these proceedings and permanently, from instituting or prosecuting arbitration proceedings against plaintiff and from instituting or prosecuting litigation against plaintiff in any other forum or tribunal.

5. Grant such other or further relief as may be appropriate.

Alberto-Culver Company, a
Delaware corporation,
Plaintiff

By /s/ *A. Charles Lawrence*
A. Charles Lawrence
/s/ *C. Curtis Everett*
C. Curtis Everett
/s/ *Francis J. Higgins*
Francis J. Higgins
Its Attorneys

Of Counsel:
Lawrence, Goldberg, Lawrence & Lewin
209 South LaSalle Street
Chicago, Illinois 60604
Bell, Boyd, Lloyd, Haddad & Burns
135 South LaSalle Street
Chicago, Illinois 60603
ANdover 3-1131

EXHIBIT 1 TO COMPLAINT

AGREEMENT

This Agreement is made as of this 12th day of February, 1969 between Fritz Scherk, residing at La Residence Veyrnier, Saleve, Geneva, Switzerland (hereinafter called "the Seller"), and Alberto-Culver Company, a Delaware corporation (hereinafter called "AC").

The parties hereto agree as follows:

ARTICLE I

Section 1.1

In consideration of the amount of DM 100, receipt of which is hereby acknowledged by the Seller, the Seller grants to AC an irrevocable option, exercisable as provided in Section 1.1.1, to purchase from the Seller at the time of closing, as defined in Section 1.5, on the basis of the representations and warranties and subject to the terms and conditions set forth in this agreement and for the total purchase price specified in Section 1.2, the following:

All issued and outstanding shares of stock of a new Liechtenstein corporation (hereinafter called "AG") to be formed by Seller, in accordance with Section 1.4. AG shall own all assets, except as specifically excluded in this section, and the liabilities set forth in this section, of Scherk Etablissement Vaduz, a Liechtenstein establishment, (hereinafter called "SEV"), as of the date of the transformation described in Section 1.4. The assets owned by SEV and to be owned by AG include without limitation cash, accounts receivable, inventories, prepaid expenses, office furniture and equipment, amounts due from affiliated

companies, a hundred (100) per cent interest in Scherk Ges. GMBH, an Austrian corporation, (hereinafter called "GMBH"); the business of SEV as a going concern, goodwill, trademarks, trade names (including but not limited to the name "Scherk"), designs, copyrights, patents, applications, licenses, processes, formulae, trade secrets, inventions and similar rights owned or controlled by SEV, and all trademarks, trade names, their registrations and the goodwill of Scherk Ltd., a United Kingdom corporation, wholly-owned by Seller (hereinafter called "UK"). The assets exclude the shares of (a) UK, (b) Scherk Perfumery Ltd., an Israel corporation, (c) Lysia S.A. and Semic S.A., Spanish corporations, owned by SEV or Seller on the date of this agreement, and (d) all trademark registrations in Israel (for use only in Israel) and the use in Israel (but only in Israel) of the tradename "Scherk".

• • •

Section 1.1.1

The irrevocable option refererd to in Section 1.1 may be exercised by AC at any time after the date hereof and before February 25, 1969 by giving written notice of exercise to the Seller, c/o Messrs. Kaye, Scholer, Fierman, Hays and Handler, 425 Park Avenue, New York, New York 10022. If such notice is not given within the aforesaid period, said option shall expire at the close of business on February 25, 1969. If such notice is given within said period, the Seller shall be obligated to sell, and AC shall be obligated to purchase all the shares of AG on and subject to the terms and conditions set forth in this agreement.

Exhibit 1 to Complaint

Section 1.2

The purchase price to be paid by AC for all issued and outstanding shares of AG shall be the amount of DM 8,200,000, subject to increase or reduction as hereinafter set forth, and payable as follows:

• • •

Section 1.3

In order to secure the performance of the irrevocable option referred to in Section 1.1, Seller shall on the date of the closing of another agreement dated February 11, 1969 between AC and Seller (hereinafter referred to as the "other agreement"), irrevocably assign to the Praesidial-Anstalt, a Liechtenstein establishment (hereinafter called "Escrow Agent"), all his rights as founder and owner of SEV to enable the Escrow Agent to effect the transformation of SEV into AG as provided in Section 1.4 of this agreement and to take all other actions to enable the Escrow Agent to comply with this agreement and the annexed Escrow Agreement. At the same time Seller shall deliver to the Escrow Agent such other instruments, including stock powers endorsed in blank for the shares of AG, revocations of existing powers of attorney and resignations of directors as may reasonably be requested by AC or the Escrow Agent. Seller warrants that he owns and has clear title to 100% of SEV, that his rights to SEV are free and clear of liens and encumbrances, that no other persons have any ownership rights or any right to acquire an ownership interest with respect to SEV and that he has the exclusive right and power to assign such rights as contemplated by this Section 1.3.

Section 1.4

Not later than February 28, 1969, Seller and the Escrow Agent shall have caused SEV to be transformed (umgewandelt) into AG in accordance with the following

terms and conditions and the terms and conditions of the annexed escrow agreement:

(a) All actions and documents in connection with such transformation shall be communicated to and be satisfactory to AC.

(b) The name of AG shall be Scherk Enterprises V. A.G., or a similar name satisfactory to AC.

(c) AG shall have an authorized and issued capital of 10,000 common shares, par value SFr 5 per share. The certificate for said shares shall be registered in the name of Seller.

(d) Seller shall take all steps necessary to cause AG to have good and merchantable title to all assets of SEV pursuant to Section 1.1, including all shares of GMBH, all trademarks, applications and registrations contained on the lists referred to in sub-section 3.6(a) (including the goodwill of the business pertaining thereto and the right to recover for past infringement), of SEV and UK within or outside of Liechtenstein, and all rights of SEV under all its existing agreements with others. Seller, SEV, GMBH and UK will take all necessary actions to perfect good title, to the extent warranted to be held by SEV, GMBH or UK pursuant to Section 3.6, in AG and GMBH in and to all applications, registrations and trademarks set forth in Exhibits TM-1B, TM-2 and TM-3 respectively and to any subsequently discovered registered trademarks and pending applications.

(e) All expenses, including taxes and legal fees, in connection with the transformation and the actions required to be taken in connection therewith shall be borne by Seller.

• • •

Exhibit 1 to Complaint

Section 3.12

All of the representations and warranties hereinabove contained in this Article will be true and correct at and as of the time of closing with the same force and effect as though made at and as of the time of closing, except for changes contemplated or permitted by this agreement.

• • •

Section 9.4

The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof and either party shall request that the matter shall be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four weeks after notice of the controversy, such appointment shall be made by said Chamber. All arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance.

• • •

EXHIBIT 3 TO COMPLAINT

AGREEMENT

This Agreement is made as of the 11th day of February, 1969, between Fritz Scherk, residing at La Residence Veyrnier, Saleve, Geneva, Switzerland (hereinafter called the "Seller"), and Alberto-Culver Company, a Delaware corporation (hereinafter called "AC").

Whereas, the Seller desires to sell to AC and AC desires to buy from the Seller, the assets of the Seller hereinafter described, upon the terms and conditions set forth below.

Now, Therefore, the parties hereto agree as follows:

• • •

Section 9.4

The parties agree that if any controversy or claim shall arise out of this agreement or the breach thereof, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four (4) weeks after notice of the controversy, such appointment shall be made by said Chamber. Unless otherwise agreed, all arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance.

• • •

Exhibit 5 to Complaint

EXHIBIT 5 TO COMPLAINT

(Letterhead of Pattishall, McAuliffe & Hofstetter, Prudential Plaza, Chicago, Illinois 60601)

April 6, 1970

Robert D. Silver, Esq.
Alberto-Culver Company
2525 West Armitage Avenue
Melrose Park, Illinois 60160

Scherk Acquisition

Dear Bob:

As you know, during the period from the end of November, 1969, when possible breaches of the trademark warranties in the FLS and SEV acquisition agreements were first called to your attention, up to the present date, we have worked both here and in Germany in conjunction with you and your Legal Department in a painstaking review of the above. Mr. John Andrew of our office has just returned from a ten-day trip to Berlin and Munich, where he met with Messrs. Quack and Staeger, as well as Alberto-Culver personnel, seeking to obtain a complete picture of what is involved. His study of the files, records and various relevant materials discloses breaches of the warranties contained in Sections 3.6(a) (unencumbered title), 3.6(e) (no pending legal or administrative actions, and 3.6(h) (use of marks where required by law). His examination also reveals that many of the matters involved had received the personal attention of Mr. Scherk and of Mr. Navon and Mr. Marks who were Mr. Scherk's representatives in the negotiations with Alberto-Culver.

Mr. Andrew has found that title to the trademarks acquired from FLS and SEV is encumbered by more than

fifty agreements with third parties respecting the use and registration of Scherk marks or of third party marks, the registration of which has been opposed by Scherk.

Among the agreements found are three with Norddeutsch Woll — und Kammgarn-Industrie A.G., Alwin M. Bach and C. F. Asche & Co., A.G., dated August 2, August 30 and September 3, 1940, respectively, in which Scherk's predecessor agreed to limit its use of the trademark LARA to "facial water". We understand that the agreement with Asche was brought to the attention of FLS by Asche in the early 1960's and a copy of the agreement was sent by Mr. Staeger to FLS on June 27, 1962. Similarly, the Norddeutsche agreement is referred to in a letter from Mrs. Haas of FLS to Mr. Staeger dated February 9, 1965 and initialled by Mr. Fritz Scherk, a copy of which is enclosed. In 1953 and 1954 FLS entered into a series of four additional agreements with the Hoffman-LaRoche, Boehringer, Henkel & Cie. and Jura firms in which FLS agreed to use its registration of LARA in the pharmaceutical class, German Registration No. 663,861, only as a defensive mark. These agreements restricting use of LARA extend significantly beyond the partial refusal of protection in Germany for the SEV international registration of LARA, No. 186,814, which left the mark free for use on "perfume products in general, cosmetics, soaps and hygienic products".

Other significant agreements found by Mr. Andrew include:

1) A 1965 agreement with Colgate-Palmolive settling oppositions based on Scherk's ACTION and GO GO marks and permitting Colgate-Palmolive to use its marks ACTION GO on laundry products;

2) a 1962 agreement with Helene Curtis settling an opposition brought by Scherk based on GO GO by permitting Curtis to use GO GAY on hair spray;
3) a 1943 agreement with Dr. Janssen, a German firm, permitting it to use JARA on toothpaste;
4) an agreement dated October 28, 1968, signed by Fritz Scherk, with the French firm Pechiney-Progril S.A., prohibiting the use of SEV's GO GO for chemical products for agriculture and gardening;
5) a 1958 letter agreement with the Swiss firm Dr. A. Wanger agreeing never to use TAOS in France, Italy and Switzerland where Dr. A. Wander apparently uses TAO for a suntan preparation;
6) an agreement with Wella dated May 3, 1962, ending an opposition based on TRISENA and permitting Wella's registration of FRISINA for hair care products; and
7) an agreement with Badische signed by Fritz Scherk on April 24, 1968, in which SEV agreed never to use ACTION for medicines, insecticides and herbicides.

Copies of those agreements found in the Scherk files which have not previously been delivered to you are enclosed, together with a list of those agreements which, from reference in the files, Mr. Andrew determined to have come to the attention of Scherk or Navon.

With respect to pending legal and administrative actions, we find, as previously reported, a large number of pending opposition actions brought by FLS and SEV against third parties. The files reveal to Mr. Andrew that the pendency of many of these opposition actions were known to Messrs. Scherk and Navon. Mr. Andrew has

noted, for example, that late in October 1968 Mr. Navon personally authorized the filing of an opposition action in Spain based on FLS's registration of LA PATINE. Lists of such pending FLS and SEV matters bearing notations as to the dates of letters concerning them seen by Messrs. Scherk and Navon are enclosed.

The files also reveal that during the period of intensive negotiations in 1968, Scherk had agreed to Bristol-Myers' request that it cancel its British registration of the trademark OBREY. The January 10, 1969 letter from the A. A. Thornton firm in London to FLS confirming that the cancellation had been completed and stating that it had been done "in accordance with the arrangement made with the Bristol-Myers Company" was initialled by Mr. Navon. A copy of the letter was sent by Thornton to Mr. Marks.

Two court proceedings involving Scherk marks have also come to our attention. In one, involving the Brautigam firm, the German Federal Patent Court held that Scherk's LARA and Brautigam's ARYA-LAYA are confusingly similar. Since Brautigam has prior rights, this decision could result in cancellation of the German LARA registrations, although a settlement may yet be negotiated. Mr. Andrew has noted from the file that Messrs. Scherk and Navon were familiar with this case in the fall of 1968.

The second series of cases which has come to light involves Scherk's mark RENAISSANCE. This began as an unfair competition action against Revlon's use of the mark in a descriptive sense in advertising. Of particular importance is the counter-action brought by Revlon against SEV in the German Patent Office, seeking cancellation of SEV's German extension of its international registration of RENAISSANCE on the ground that SEV is merely a paper company without a legitimate business.

Exhibit 5 to Complaint

International trademark registrations, under the Madrid Arrangement, must be based upon registration in the country of origin. "Country of origin" is defined in Article 1(3) of the Convention as the country where the owner of the mark has "a real and effective industrial or commercial establishment" or where he is domiciled.

Although we understand that steps have been taken since the beginning of the Revlon proceeding to make sales of Scherk products through Liechtenstein, there appears to be a serious continuing question as to whether SEV has "a real and effective industrial or commercial establishment" in that country.

A general settlement of the pending matters has been negotiated with Revlon, which Mr. Staeger recommends be accepted in order to avoid a ruling on the point raised by Revlon. There remains the possibility that the Patent Office, despite the settlement, would rule on the matter *ex parte* adversely to SEV.

The point raised by Revlon in the SEV RENAISSANCE cancellation proceeding affects, of course, all the SEV International registrations which have been extended to Germany. As a matter of non-binding precedent and of comity, an adverse opinion could be damaging in other countries belonging to the Madrid Arrangement.

Mr. Andrew was informed by Mr. Staeger that Mr. Scherk worked closely with him on the RENAISSANCE matters. Mr. Staeger has also informed Mr. Andrew that when Mr. Marks visited him in Munich in 1968 he informed Mr. Marks of the pendency of the RENAISSANCE cases and stressed that they presented a serious problem.

With respect to Section 3.6(h), it appears to Mr. Andrew that despite the warranty to the contrary, the mark LARA had not been used within the prescribed statutory

period in certain countries requiring use of a trademark, and that this may also be true of other marks. Such non-use would be especially harmful in Liechtenstein, where it could provide a vehicle for attack on the home registrations supporting SEV's international registrations.

* * * [sic]

In summary, investigation has revealed that the trademark portfolio which Alberto-Culver has obtained from Scherk is heavily encumbered by agreements and pending matters which should have been called to Alberto-Culver's attention and listed in the exhibits to the warranties but were not.

It is clear that Mr. Scherk and his agents knew the great value Alberto-Culver placed on the unencumbered trademark rights which it thought it was obtaining from Scherk. During the negotiations on January 24, 1969, we understand that Mr. Navon, the principal negotiator for Scherk, advised Alberto-Culver that Proctor & Gamble had agreed to pay Scherk DM 30,000 for the right to use the mark TAG, which is similar to Scherk's TAR and TAO, in Denmark, and DM 200,000 for the same rights throughout Western Europe. We also understand that Mr. Scherk was well aware from his meetings with Mr. Lavin of the importance which Alberto-Culver attaches to good unencumbered trademark rights. We are informed that Mr. Marks was repeatedly advised to the same effect.

We understand, and are personally aware, that it was repeatedly made clear to the negotiators for Scherk that Alberto-Culver expected to received entirely unencumbered clear title to the trademarks being transferred, and that such was the reason for Alberto-Culver's negotiators insistance upon inclusion of the trademark warranties in the agreements. It was as a result of such insistence that the various Tarsia agreements and the LARA case in Italy

came to light. Having stressed the importance of the trademark warranties and having had certain exceptions to them disclosed, we believe that Alberto-Culver was entitled to rely implicitly upon Scherk's warranties when the agreements were signed.

In our opinion, the character, nature and value of the trademark rights as represented and warranted by Scherk differ so materially from their actual character, nature and value as to constitute a failure of consideration. Mr. Andrew's and your own recent discoveries dictate our conclusion that the Scherk trademark portfolio is encumbered with limitations, undisclosed by Scherk and not known by Alberto-Culver at the time the agreements were signed, which substantially reduce its value to any purchaser. The portfolio so encumbered must be considered of relatively small value compared to its value without such encumbrances.

Cordially yours,
/s/ B. W. Pattishall

BWP;maf
cc: C. Curtis Everett, Esq.
A. C. Lawrence, Esq.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

MOTION TO DISMISS, OR ALTERNATIVELY TO STAY

(Filed Aug. 31, 1971.)

Now comes defendant Fritz Scherk by his attorneys and moves this Court for an order (1) dismissing this action pursuant to Rule 12(b) of the Federal Rules of

Civil Procedure and quashing service of summons, or (2) dismissing the action on the grounds of forum non conveniens, or (3) alternatively, staying this action while the parties pursue arbitration. Defendant Fritz Scherk also moves this Court for an order striking plaintiff's claim for exemplary damages under Counts I and III.

As more fully appears in the briefs to be filed in support of this motion pursuant to local Rule 13 and the attached affidavits of Fritz Scherk (Exhibits A and B), and Gerard Batliner (Exhibit C), the declaration of the Swiss Federal Department of Justice and Police (Exhibit D), and the complaint with its attached exhibits, the grounds for this motion are as follows:

1. This Court has no jurisdiction of the subject matter of Counts I and III which allege a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The transactions at issue are all foreign based, not involving United States' securities markets, nor requiring protection by this Court of United States' investors. No claims are stated as to the four transactions at issue because securities are not involved or the allegedly false representations were not made as to the securities.

2. Service of process, apparently made pursuant to Rule 4(i)(D)(1), was insufficient. First, the files of this Court do not contain any certificate or affidavit of proper mailing by the clerk of the Court. Also, no receipt signed by defendant is on file showing proper delivery.

Secondly, any service of process by registered mail upon a domiciliary of Switzerland violates Swiss law and should not be recognized by this Court. (Declaration of Federal Department of Justice and Police, Exhibit D).

3. This Court lacks personal jurisdiction of defendant Scherk. Service of process was insufficient. (See item 2 above.) Scherk conducts no business, has no property and

maintains no residence in this district. Scherk has not had sufficient minimal contacts with this jurisdiction upon which to base personal jurisdiction. Scherk made no representations as to trademarks in this district. (Scherk affidavit, Exhibit A.)

4. This action should be dismissed on the basis of forum non conveniens. Defendant lives and works in Europe. Plaintiff Alberto-Culver does business in Europe. The parties agreed to arbitrate this dispute in Paris. The negotiations between the parties substantially occurred in Europe. The businesses acquired are all in Europe. Numerous witnesses and documents, including the official governmental records of the trademark registrations and alleged pending actions pertaining thereto, if any, are in Europe, beyond the jurisdiction of this Court. (Scherk affidavit, Exhibit B.)

5. If the action is not dismissed for any of the foregoing reasons, it should be stayed pending the outcome of arbitration agreed upon by the parties pursuant to 9 U.S.C. §3 and this Court's inherent power to regulate its own docket.

6. Exemplary damages may not be granted for alleged violations of Section 10(b) of the Securities Exchange Act of 1934. Only actual damages may be granted.

Dated: August 31, 1971

Respectfully submitted,
Fritz Scherk
By /s/ *Lynne E. McNown*
One of his Attorneys

Jenner & Block
135 South LaSalle Street
Chicago, Illinois 60603
641-6060

(Certificate of service omitted in printing.)

Exhibit A to Motion to Dismiss

EXHIBIT A

AFFIDAVIT

State of Israel)
) ss
)

State of Israel)
City of Tel Aviv/Jaffa)
Embassy of the United States) ss
of America)

Fritz Scherk, being duly sworn, on oath says:

1. I am a citizen of Germany and reside in Geneva, Switzerland, where I make my home. I maintain no residence or property in the United States of America, nor do I have or transact any business in that country.

2. About June, 1967 by a letter, and in November, 1967 by a visit I was contacted in Berlin, Germany, where I was then living, by Mr. Fred Maeding, an employee of Alberto-Culver, who inquired whether I would be interested in selling my businesses to Alberto-Culver. This was my first contact with Alberto-Culver. There ensued various negotiations in Berlin for the purchase by Alberto-Culver of these businesses. I was then asked by Alberto-Culver to send a representative to Chicago to directly negotiate with Mr. Lavin, President of Alberto-Culver. Mr. Benjamin Navon attended in Melrose Park, Illinois on or about December 20, 1967 on my behalf. Negotiations reached an impass and were terminated.

3. On or about February, 1968 I was again contacted by Alberto-Culver, who wished to renew negotiations, which were subsequently resumed in Berlin, and Mr. Lavin attended meetings in Berlin about March, 1968.

Exhibit A to Motion to Dismiss

In May, 1968 I came to the United States at the suggestion of Mr. Lavin, President of Alberto-Culver, for the purpose of attending a conference for the continuance with Mr. Lavin and other executives of Alberto-Culver, of the negotiations for the purchase of my businesses. This was my first visit to the United States since 1958. I spent approximately three days in the United States during this visit, and then returned to my home in Berlin. During my stay in the United States, I made no mention of any trademarks, except to state to Mr. Lavin that the businesses owned a number of them.

4. Following my return to Germany, the lawyers prepared drafts of agreements, and visited Europe on a number of occasions to obtain extensive information on the businesses and other matters, and there were further conferences and negotiations in Europe, particularly in December, 1968. I signed the agreements in Vienna, Austria in February, 1969 and the closing took place in Geneva, Switzerland in June of that year. I did not visit the United States again until nearly a year later, after Alberto-Culver had written me informing me that it was rescinding the agreements between us.

/s/ *Fritz Scherk*
Fritz Scherk

(Jurat omitted in printing.)

Exhibit B to Motion to Dismiss

EXHIBIT B

State of Israel)		State of Israel	)
	) ss	City of Tel Aviv/Jaffa	)
	)	Embassy of the United States of America	) ss)

Fritz Scherk, being duly sworn, on oath says:

1. I am the defendant in an action which I have been informed Alberto-Culver Company has purported to have instituted against me in the United States District Court for the Northern District of Illinois.

I am informed that this law suit arises out of the purchase by Alberto-Culver from me of certain businesses and that Alberto-Culver claims in this law suit that there have been breaches of warranties with respect to various trademarks registered in Europe.

2. The businesses in question are located in Germany and Liechtenstein in Europe. Their records are maintained, and all of their employees having first-hand knowledge of the businesses reside in Europe.

3. Extensive negotiations leading up to the sale of my businesses were carried on in Germany and Liechtenstein. Peat, Marwick and Mitchell Company, Chartered Accountants, and Drs. Broenner, Wirtschaftspruefer G.m.b.H. who examined the books of the businesses and certain experts who were consulted concerning trademarks and goodwill involved in the negotiations, reside and work in Germany, Austria and Liechtenstein.

Exhibit B to Motion to Dismiss

4. At the time of the sale of the businesses referred to, the businesses held a total of something over 275 trademark registrations effected in 10 countries of Europe and over 130 trademark registrations effected through filing in Geneva pursuant to the Arrangement of Madrid for the International Registration of Trademarks.

Each of these 130 registrations entitles the holder to rights in up to 10 European countries. A list of the registrations by number is annexed hereto as Annex A, which also lists registrations owned outside of Europe. No registrations were owned in the United States of America.

5. All of the official records filed with the respective and governmental trade-mark and Patent authorities concerning the above mentioned Europeans trademarks and their present status of record are located in Europe as are the attorneys who filed the original applications and processed them and maintained the registrations in effect.

6. I have heretofore been informed by my attorneys of the alleged agreements, and of the alleged "trademark actions", which Alberto-Culver claims constitute violations of warranties. All of the documents so referred to were signed in Europe, and all of the parties to them, to the extent that the parties still exist, and all persons who prepared these documents, are located in Europe. Similarly, the "alleged trademark actions", if they exist, are being carried on exclusively in Europe, and all of the attorneys carrying them on, and all of the official records with respect to them, are located there.

/s/ Fritz Scherk
Fritz Scherk

(Jurat omitted in printing.)

Exhibit C to Motion to Dismiss

EXHIBIT C

AFFIDAVIT

Principality of Liechtenstein)
) ss
City of Vaduz)

Confederation of Switzerland)
Canton and City of Zurich)
Consulate General of the) ss
United States of America)

Gerard Batliner, being duly sworn, on oath says:

1. I am a member of the bar of the principality of Liechtenstein and authorized to practice in the courts of Liechtenstein. I represented Mr. Fritz Scherk in an action which he commenced in the Liechtenstein Landgericht, a court, in February, 1971 against Scherk Enterprises V. Aktiengesellschaft, a Liechtenstein corporation ("SEV") owned by Alberto-Culver Company. This proceeding was brought by Mr. Scherk to preserve interalia the status quo; in it, he sought and obtained from the court an injunction forbidding SEV to transfer or hypothecate its property to Alberto-Culver or to settle claims of Alberto-Culver and requiring approval of the Liechtenstein directors of SEV for actions of the SEV Board of Directors.

2. SEV was represented in this action by Dr. Peter Ritter, also a Liechtenstein lawyer. In an appeal against this injunction, SEV argued that

> "(a) . . . In this provision (Section 9.4 of the agreements of February 11 and 12, 1969) Fritz Scherk and the Alberto-Culver Company agreed, viz., on the exclusive jurisdiction, for all controversies or claims arising out of this contract or its breach, of the International Chamber of Commerce, Paris, France, as arbitral court. It is very questionable whether a judi-

cial injunction proceeding (Sicherungsverfahren) is at all permissible when the basic claim can be decided only by the arbitral tribunal, so that as a practical matter, the justificatory complaint underlying the injunction (Sicherungsbot) could be initiated only in this arbitral court. This is, as mentioned, questionable if either a local court or a local arbitral court were to be occupied with the matter.

"(b) But such an injunction proceeding is absolutely inadmissible if the principal claim can be established only in a foreign arbitral court, whose decree is not even enforceable locally. A decree of a French arbitral court is denied direct enforceability in Liechtenstein. The plaintiff bases his claim for the injunction on his claims against Alberto-Culver. These claims can be established only, as mentioned, in a French arbitral court.

"For this reason the present injunction is inadmissible, as a consequence of lack of jurisdiction or inadmissibility".

The foregoing is quoted from page 17 of Dr. Peter Ritter's brief of March 16, 1971, a copy of which page is annexed to this affidavit as Annex A.

3. The Landgericht upheld the injunction stating in part that

"The impossibility of direct execution of an arbitral decree in the main action does not prevent at all a local injunction proceeding. An arbitral decree of the Paris International Chamber of Commerce would in addition be a title for rejection of opposition against an official order of payment (Rechtsöffnungstitel) in Liechtenstein" (extract from page 7 of May 5, 1971 decision of Landgericht, a copy of which page is annexed hereto as Exhibit B).

/s/ *Gerard Batliner*

Gerard Batliner

(Jurat omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF FRANCIS J. HIGGINS
(Filed Oct. 4, 1971.)

Francis J. Higgins, being first duly sworn, on oath deposes and says that:

1. I am an attorney duly admitted to practice before this Court and before the Courts of the State of Illinois.

2. I have read the Affidavit of Mr. Gerard Batliner, Liechtenstein counsel for Mr. Scherk, filed in support of the pending Motion to Dismiss.

3. I am personally familiar with the Liechtenstein litigation referred to in the Batliner Affidavit, having gone to Liechtenstein in May, 1971, to aid Alberto-Culver Company's Liechtenstein counsel in preparing an appeal from an injunction issued by the Liechtenstein trial court in favor of Mr. Scherk against Scherk Enterprises V. Aktiengesellschaft ("SEV") a Liechtenstein corporation owned by Alberto-Culver Company.

4. The Liechtenstein litigation instituted by Mr. Scherk was not based upon and did not involve the Securities and Exchange Act of 1934 nor did it seek to enforce any rights created by the Agreements attached to the Complaint in this case. Instead, it was based upon a claimed "contract of rescission" of those Agreements alleged by Scherk to have been entered into between Scherk and Alberto-Culver

Company as a result of certain subsequent correspondence in 1970. Alberto-Culver Company was *not* a party to the Liechtenstein case.

5. In a Decision dated August 11, 1971, the Appellate Court of Liechtenstein (Furstlich Liechtensteinisches Obergericht) reversed the lower court and vacated the injunction against SEV on the grounds, upon other things, that Scherk's claims, if any, could be made only against Alberto-Culver Company and not against SEV. In its Opinion, the Appellate Court noted that "an arbitration tribunal could only be agreed to for disputes between the plaintiff and Alberto-Culver, not between the plaintiff and third parties", i.e., SEV. The Appellate Court also noted in its Opinion that Scherk's claim was not based on the 1969 Agreements of acquisition and that therefore the arbitration clauses in those Agreements did not apply to the dispute brought by Scherk before the Liechtenstein Courts.

/s/ *Francis J. Higgins*
Francis J. Higgins

(Jurat omitted in printing.)

(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

AFFIDAVIT OF ROBERT D. SILVER
(Filed Oct. 4, 1971.)

Robert D. Silver, being first duly sworn, on oath deposes and says that:

1. I am General Counsel and a Vice-President of Alberto-Culver Company (hereinafter called "Alberto"), a Delaware corporation, with its principal place of business in Melrose Park, Illinois, and I am authorized to make this Affidavit on behalf of Alberto in opposition to the Motion of Fritz Scherk to Dismiss the Complaint against him.

2. In August, 1968, I was informed by Mr. Leonard H. Lavin, the President of Alberto, that an agreement had been reached with Mr. Scherk for the acquisition by Alberto of Scherk Etablissement Vaduz (hereinafter called "SEV"), Firma Ludwig Scherk (hereinafter called "FLS") and Lodeva Herstellung and Vertrieb Kosmetischer Artikel GMBH (hereinafter called "Lodeva"). Mr. Lavin requested that I work with Alberto's executives and outside counsel in the negotiation of the language, structure and terms of the written agreements to be executed by Alberto and Mr. Scherk.

3. Alberto's outside counsel in this matter was Mr. Walter Treumann of the firm of Bell, Boyd, Lloyd, Haddad and Burns, Chicago, Illinois. In addition, I retained the

services of the firm of Pattishall, McAuliffe and Hofstetter, Chicago, Illinois, to work with me on the trademark aspects of the agreements.

4. Mr. Scherk was represented in these negotiations and discussions by Mr. Stuart Marks, an attorney from New York City, New York.

5. In early June, 1968, Mr. Marks and Mr. Scherk met with Mr. Treumann in Chicago, Illinois, and thereafter, for a period of several months, Mr. Marks sent from New York to Chicago extensive information concerning the trademarks purportedly owned by the Scherk businesses and revenues generated by SEV. (See Exhibits A through J attached hereto.)

6. During the month of November, 1968, at a time when Mr. Treumann, the Pattishall firm and I had under consideration the language of the trademark warranties to be included in the agreements, Mr. Marks sent to Mr. Treumann in Chicago a telegram and a letter which are referred to and quoted in paragraphs 7(a) and 7(b) of the Complaint. Copies of the telegram and letter are attached hereto as Exhibits K and L.

7. On December 8, 1968, I was present at a meeting at the offices of the Pattishall firm. Mr. Marks came to Chicago to attend that meeting for the express purpose of discussing the trademarks. During the meeting, other attorneys for Alberto and I addressed to Mr. Marks a large number of questions concerning the trademark portfolio as reflected on the attached Exhibit M. Mr. Marks stated during the meeting that he had just returned from Germany where he had investigated the status of the trademark portfolio. Having read the telegram and letter referred to in paragraph 6, I expressly asked Mr. Marks on

that occasion whether there were any restrictive agreements, opposition proceedings, litigation or other legal proceedings, past, pending or threatened, with respect to the trademarks other than those referred to in Exhibit M. Mr. Marks replied that he had checked into the matter and had determined that there was none.

8. Mr. Marks was again present in Illinois in late January of 1969 to discuss with Alberto's representatives the appropriate means of transferring to Alberto the trademarks owned by the Berlin business. As attorney-in-fact for Mr. Scherk, Mr. Marks executed either in New York or Chicago a lease of the Berlin assets from Scherk to Alberto. This was done in order to protect the trademark rights being transferred to Alberto.

9. Both the agreements and the promissory notes were executed by Alberto in Melrose Park, Illinois, in February, 1969, and forwarded to Europe for execution by Mr. Scherk. The FLS and SEV agreements contain the express warranties referred to in paragraph 7(d) of the Complaint. Attached hereto as Exhibit N is the stock certificate representing all the shares of SEV acquired by Alberto.

10. In 1970, after Alberto had acquired the Scherk businesses, there was brought to my attention for the first time a legal proceeding relating to one of the warranted trademarks. I therefore sent Mr. John Andrew of the Pattishall firm to Germany for the purpose of making a thorough investigation of the status of the trademark portfolio. Upon his return, the Pattishall firm advised me in their letter dated April 6, 1970, (Exhibit 5 to the Complaint and Exhibit C to the Lavin Affidavit) of the trademark impairments which he had discovered and of their

conclusions as to the effect of such impairments upon the value and validity of the warranted trademark portfolio acquired by Alberto. Mr. Andrew brought back from Germany all of the principal documents evidencing the restrictive agreements and proceedings referred to in the Pattishall letter. All such documents will be available in this jurisdiction for use in discovery and at trial. To the extent that certified copies of foreign court records and official governmental documents may be required, they can be easily obtained by mail.

/s/ Robert D. Silver
Robert D. Silver

(Jurat omitted in printing.)

(Certificate of Service omitted in printing.)

EXHIBIT K TO SILVER AFFIDAVIT

WESTERN UNION TELEGRAM

(Handwritten notes omitted.)

1968 NOV. 15, A.M. 10 31

BERLIN FA 1/TF 119 15 1632 PAGE 1/50
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BELLBOYD CHICAGOILL

Exhibit L to Silver Affidavit

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EXHIBIT L TO SILVER AFFIDAVIT

(Letterhead of Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York, N.Y. 10022)

November 26, 1968

AIR MAIL
SPECIAL DELIVERY
Walter Treumann, Esq.
Bell, Boyd, Lloyd, Haddad & Burns
135 South LaSalle Street
Chicago, Illinois 60603

Dear Walter:

This letter will cover a number of points which have been raised:

1. Enclosed are copies of the charter documents of Lodeva and Scherk Gesellschaft G.m.b.H.

2. I would like to press strongly for a trademark representation in the text enclosed. I am advised by Langner, Parry (both in New York and Chicago) that this is all that anyone can reasonably say or be sure of, and I would imagine that this is all Alberto-Culver's trademark com-

sel can safely say about the Alberto-Culver marks. We would of course be willing to add what I mentioned this evening, namely, that no litigation is pending, or, to our knowledge, threatened against Scherk's trademarks, and that the adverse claims, if any, informally made are not such as to materially affect the value of the trademark of Scherk.

3. The post-war history of title to the marks is set forth in the following documents, copies of which are enclosed:

a. *Decision of Restitution Court nullifying sale agreement between Ludwig Scherk and Scherk GmbH. of June 29, 1938.* At the time of this decision, Scherk GmbH. bore the name Tarsia. The latter was ordered by the decision to restore to Firma Ludwig Scherk, said to be exclusively owned by Fritz Scherk, the enterprise which Ludwig Scherk had sold to Scherk GmbH. in 1938. The Grunde recite the various name changes of Scherk GmbH. and also explain something about Ludwig Scherk's will.

b. *Decision of Restitution Court ordering Estate of Ludwig Scherk to make certain payments to Tarsia.*

c. *Agreement between Estate of Ludwig Scherk, Fritz Scherk, Tarsia and Schering carrying out the above decisions.* You will note that paragraph I(1) (c) deals with the transfer to Fritz Scherk of various trademarks. Paragraph II(1) deals with "Tarr," "Tarsia," etc. in Germany and will give you, I believe, the information Mr. Silver wanted on this subject.

d. *Notarial act with respect to assets of Ludwig Scherk and interests therein.* By this instrument, the executor of Ludwig Scherk, who had a five per cent interest in certain

assets in the latter's estate, agrees to sell that interest to Fritz Scherk for a sum of money.

I trust that the above will help clarify the situation.

Sincerely,

Stuart

SM:bp

Enclosures

P.S.: Since this is being sent out before I have read it, I am not sure that all the enclosures are legible. If some are not, I will send you better copies on Wednesday.

EXHIBIT M TO SILVER AFFIDAVIT

QUESTIONS POSED TO MARKS AT DECEMBER 8, 1969 CONFERENCE

(Handwritten notes omitted)

1. Clause 6(e) of will—German lawyer says.
   English lawyer says only applies in United Kingdom.

   Math.—FS reciprocal offers.
   Math. giving letter—no claims under estate.

   Berlin—March 1, 1957: National Act
   Math. giving up rights

   SM drafting disclaimer—release for Math.

2. Walter Scherk agreement antitrust problem—okay SM.

3. Executory aspects of 1960 Walter agreement.

   Walter Scherk still owns TARS, 144,403 in Switzerland. Others?

4. Fritz: failure to observe WS-FS agreements.

   Cancel international registrations—gives us something to bargain with Walter with SM.

Exhibit M to Silver Affidavit

5. Italy—"MISS LARA" registered by our licensee, Soc. des Grandes Marques, SpA.
Will be cancelled—SM
Sure it can be handled.

6. TARR story

29 June 1951—Austrian restitution.
Tarsia GmbH Wien restored to estate of Ludwig Scherk.

Is Tarsia GmbH Wien still in existence? SM to check. Who owns 18.786 and 18.787 SCHERK registrations in Austria? SM to check.

Is Tarsia GmbH Wien present Scherk GmbH Wien by change of name? SM to check.

Did Schering sell off any Scherk properties or companies between 1938 and 1950? SM doesn't know—will ask.

Executory acts required of parties to 1950 Restitution agreement. Tarsia GmbH still holds 1924 SCHERK, Reg. No. 323,873. SM will find out about it.

Tarsia-Berlin owns Reg. No. 14,193—SCHERK, renewed in 1964. Greece—SM to check.

Italy—Tarsia SA Milan owns TARR and LARA registrations 1950. What has become of this company? SM to find out.

1963 agreement—RS:poses commercial problem of some moment. Don't know what Lavin will do.

Quid pro quo for 1963 agreement—SM doesn't know.

Joint defense obligations. No assignment clause in 1963 agreement.

License agreements—many governed by Swiss law. Talked to Swiss lawyers—similar to American law. SM requests that RDS talk to Nadler first.

Exhibit M to Silver Affidavit

7. Anything between parties to 1963 agreement since then? SM to find out.

8. Austria—no certificates received.

9. Netherlands—what happened to N.V. Scherk?

10. Turkey—problem between search report and listings. English company on list—10310, 10309, 10308. From search: 29,822, 29,823 and 29,824—1963 registrations in name of English company. Need certificates for those. Turkey—license. Royalty payments. Contract says none. Private annex says one thing—oral agreement says other. Payments made under table to avoid exchange controls. SM to get story. RS to let Nadler know.

11. Portugal—why two TARR and SCHERK registrations not cover cosmetics? SM to find out.

12. Germany—International registration extensions to Germany in apparent contravention (based on two German registrations).

	German
TARSIA	238,750
TARS	447,818
TARR	451,979
TARR bottle	454,797

—held to protect old rights. FS realizes can't use in Germany.

LARA—registration in 1959, 725,614, in Fritz's name. Transfer clause—should include FS personally. International registration based on this one. SM guarantees we get it.

13. East Germany—told that FS is selling TARR there. SM doesn't know figures. Doesn't know if it is TARR. SM will check.

Would be in violation of restitution and 1963 agreements.

14. We have problem with our proper recipient in Germany. SM-FS wants to know if we are buying assets or Firme Ludwig Scherk?

15. Liechtenstein—SEV licenses German FLS. Includes TARR marks. Prohibited in Germany.
AM to check. May just delete TARR mark from list.

16. Executory obligations of existing agreements.
FLS to do within a time period or we do at his expense. SM basically agree.

17. Divorce. Didn't mention terms at all. SM. Fritz agreed to leave half of property to kids—owned at his death.
No encumbrances to existing property.

Warranties—
SM—U.S. and Canada not essential.
Not making any warranties all around world.
Will warrant only where they know they do have rights.

There are no registered license agreements.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF LEONARD H. LAVIN

(Filed Oct. 4, 1971.)

Leonard H. Lavin, being first duly sworn on oath deposes and says that:

1. I am President and Chief Executive Officer of Alberto-Culver Company (hereinafter called "Alberto"), a Delaware corporation, with its principal place of business in Melrose Park, Illinois. I am authorized to make this Affidavit on behalf of Alberto in opposition to the Motion of Fritz Scherk to Dismiss the Complaint of Alberto against him.

2. Alberto is and at all relevant times has been engaged in the business of manufacturing and distributing consumer products, including toiletries, hair products and related items for the mass market. Prior to February, 1969, Mr. Scherk was the owner of several interrelated businesses engaged in the manufacture and sale of cosmetics and related items in Western Europe and elsewhere. Most of the direct manufacturing operations of Mr. Scherk's businesses were conducted in facilities located in Berlin, Germany. These manufacturing facilities were owned and operated by Mr. Scherk through a sole proprietorship called Firma Ludwig Scherk (hereinafter called "FLS").

3. By contrast, the Scherk entity known as "Scherk Etablissement Vaduz" (hereinafter called "SEV") was a Liechtenstein "establishment" which operated as a holding company licensing on an international basis the sale of Scherk products under a wide variety of trademarks purportedly owned by SEV.

4. The consumer identification and acceptance of the marketed products is intimately associated with the brand name. Businessmen in the mass toiletries and cosmetics market normally expend advertising, promotion and selling effort on brand names that are trouble free and which will aid in selling the product. Care is exercised to avoid infringing the rights of third parties and to avoid other limitations on flexibility, or use, or enjoyment.

5. In 1967, Alberto entered into negotiations with Scherk and his Berlin plant manager, Benjamin Navon, for the possible purchase by Alberto of all or part of the Scherk businesses. In December, 1967, I personally met with Mr. Navon in Melrose Park, Illinois, and discussed with him the nature and background of the Scherk businesses. Mr. Navon pointed out to me that, although the "German business" (FLS) had experienced serious financial difficulties in recent years, the "Scherk International Business" (SEV) had earned substantial profits through royalty income derived from its trademark-licensing arrangements. Mr. Navon stated that the success of SEV was due in large part to the effective exploitation of the SEV trademark portfolio through license agreements which generated significant royalty income. He asserted that consumers in the licensed areas responded favorably to SEV's brand names. Mr. Navon advised me that Mr. Scherk would be most reluctant to sell this "International

Business" and our discussions centered for the most part on a possible Alberto acquisition of FLS, the unprofitable German business, for a price in the area of $500,000. When Mr. Navon returned to Germany, I received a letter from Mr. Scherk rejecting the offer I had made for the German business.

6. Thereafter negotiations were resumed. I met with Mr. Scherk in Europe in March, 1968, and, as a result of renewed interest on both sides, Mr. Scherk, Mr. Navon and Mr. Scherk's New York lawyer, Mr. Stuart Marks, came to Melrose Park in late May or early June, 1968, for further discussions. Mr. Scherk met with me and other Alberto representatives and extensive and detailed discussions over a three-day period were held in Melrose Park and Chicago, Illinois. As a direct result of these discussions, Mr. Scherk and I came to an agreement in Melrose Park as to the basic terms of the acquisition, including the price to be paid by Alberto. In contrast to the earlier negotiations in December, 1967, the negotiations in Melrose Park were conducted on the premise that Alberto would acquire not only the unprofitable German business but the profitable SEV royalty operation as well.

7. I have read the Affidavit of Mr. Scherk filed in support of his Motion. The Affidavit states, with respect to the meeting in Melrose Park in May, 1968, that "I made no mention of any trademarks, except to state to Mr. Lavin that the business owned a number of them." This statement is erroneous and misleading. During the meeting in Melrose Park, Mr. Scherk, in justification of his argument that his businesses were worth substantially more than Alberto had been willing to offer, repeatedly referred to the valuable trademark portfolio owned, in particular, by

SEV, the great drawing power of the name "Scherk" and other trademarks owned by SEV, and the royalty profits generated by SEV through licensing of the trademark rights. He also emphasized the value of the trademark portfolio to Alberto both for use in connection with Scherk products and as a means of gaining access for its own products to Germany and the licensed countries. I recall that Mr. Scherk particularly mentioned the trademark "LARA" as being especially valuable and significant.

8. In his Affidavit, Mr. Scherk also states that he came to Melrose Park at Alberto's suggestion. This statement also requires clarification if it is not to be misleading. The previous negotiations in Europe had been promising but no agreement had been reached. In his letter to me dated April 30, 1968, (attached hereto as Exhibit A) Mr. Scherk suggested further discussions in Melrose Park to be held with his representatives, Navon and Marks. I simply suggested that Mr. Scherk also be present. The initiative for continuing the discussions in Melrose Park came from Mr. Scherk, not from Alberto.

9. During the discussions in Melrose Park, I offered on behalf of Alberto, and Mr. Scherk accepted, the following terms:

(a) For FLS—$250,000 in cash on December 12, 1968;

(b) For SEV—$166,000 in cash on February 28, 1969; $800,000 in notes;
A contingency agreement in the amount of $1,100,000;

(c) Consulting Agreement—$250,000 in cash on February 28, 1969.

Although these figures were subject to certain adjustments and conditions as reflected in the final agreements

(Exhibits 1 through 4 to the Complaint), the fact that agreement between Mr. Scherk and myself as to the basic terms of the acquisition was reached in Melrose Park, not in Europe, is evidenced by the letter which I received from Mr. Scherk dated June 9, 1969, attached hereto as Exhibit B. In that letter Mr. Scherk, in inviting me to attend the formal closing in Europe, stated:

> "It is more than a year that we last met at *Melrose Park to agree upon a transaction* which will now, at long last, come to its closing.
>
> ". . . and I, therefore, invite you to come to Geneva at a date convenient to everybody in order to close *the deal which I was glad to have agreed to at your office, one year ago.*" (Emphasis added)

10. At no time during the negotiations did Mr. Scherk, Mr. Navon or Mr. Marks ever inform me, nor was I aware of, any of the trademark impairments disclosed in the letter from Alberto's outside trademark counsel, Pattishall, McAuliffe & Hofstetter, dated April 6, 1970, which is attached to the Complaint as Exhibit 5 and to this Affidavit as Exhibit C.

11. In authorizing the execution of the acquisition agreements by Alberto, I believed and relied upon both the representations which had been made to me by Mr. Navon and Mr. Scherk with respect to the trademarks and the express trademark warranties contained in the agreements themselves. The agreements would not have been signed by Alberto without such representations and warranties.

12. In addition to myself, the following past and present employees of and attorneys for Alberto took part in the negotiations and discussions which preceded the execution of the acquisition agreements:

Exhibit A to Lavin Affidavit

(a) James Nadler
(b) Robert Silver
(c) Fred Maeding
(d) John Murphy
(e) L. I. Green
(f) S. W. Pike
(g) E. C. Friedel
(h) Michael Winn
(i) Ronald Steitz
(j) Walter Treumann
(k) George Martens
(l) John Andrew
(m) Jeremiah D. McAuliffe
(n) Karlheinz Quack
(o) Beverly Pattishall

13. All of the above-named persons, with the exception of Mr. Quack, Mr. Green and Mr. Pike, are residents of the Chicagoland area.

/s/ *Leonard H. Lavin*
Leonard H. Lavin

(Jurat omitted in printing.)
(Certificate of Service omitted in printing.)

EXHIBIT A TO LAVIN AFFIDAVIT

(Letterhead of Europäische Kosmetik)
Scherk 1 Berlin 41 Postfach
(Time stamp omitted.)

Mr. Leonard H. Lavin, President
Alberto-Culver Company
2525 Armitage Avenue
Melrose Park, Illinois 60160, U. S. A.

Ihre Zeichen	Ihre Nachricht vom	Unsere Zeichen	Datum
	April 9, 1968	FS/do	April 30, 1968

Exhibit A to Lavin Affidavit

Dear Mr. Lavin,

Thank you very much for your letter of April 9. I am sorry that we have not been able to reply to it before this.

First, let me state that it was indeed a pleasure for us to have you visit us during your recent trip to Europe and to be able to give you some of our products, which we are happy to learn are being used by your family.

I, too, regret that the deal which we discussed has not come along further, despite efforts on both sides, and am sorry that a misunderstanding seems to have arisen. I hope this letter, in which I shall try to set forth my views, will help clear it up.

Basically, what we are discussing is the sale to Alberto-Culver of the Scherk German and international business, that is, the entire Scherk Business with the exception of land and building (which I understand you are not interested in purchasing) and the Israel, United States and Canadian trademarks. As you know, this is a business which was established under the Scherk name as early as 1906, includes a well-established distribution organization, and finds a high degree of customer acceptance for products marketed under its name in Germany as well as in all of the major European markets, not to mention the promising sales in other parts of the world.

In our discussions, I stated that I thought that a fair price for this business was three years net sales of the business being sold (excluding, of course, sales in Israel, the United States and Canada). This figure came to DM 9,720,036 or $2,460,768. In the interest of avoiding negotiations over minor points, I agreed at the very outset to reduce the price to $2,150,000.

It was and is my view, which I believe I expressed at our meeting, that this is an eminently reasonable price for the purchase today "as is" of a going business with the

name and reputation, sales and prospects of ours. Nevertheless, in order to give further assurance that you will be getting full value, I volunteered to act as consultant for three years without pay and offered to guarantee that profits (after United States income taxes) for the fourth, fifth, and sixth years after acquisition will equal or exceed 5% of the purchase price actually paid, i.e. $321,500 after United States income taxes (your figure of $375,000 is based, I believe, on the purchase price first proposed, namely, approximately $2,500,000.)

Furthermore, I offered to secure this guaranty by leaving in escrow, out of the purchase price, the sum of $800,000, an amount which *exceeds* both the total guaranteed profits *plus* an equal amount representing United States income taxes. In the event the profit target is not equalled or exceeded, something which I consider to be unlikely, this escrow fund, which I was to be permitted to invest in the meantime, would be used to reduce the purchase price.

I had assumed that you understood the proposal as I have outlined it here, since the only amount which I recall discussing for the escrow was the $800,000 amount referred to above. I continue to believe that withholding the sum of $800,000 out of a total purchase price of $2,150,000, which itself represents a reduction of our original price, is indeed a most generous proposal, for it represents in excess of a third of the purchase price.

I hope that on reconsideration you will agree with these views. Once this point is settled, I believe, we can proceed rapidly with a transaction which I believe, is in the best interests of both of us.

Exhibit B to Lavin Affidavit

In order to avoid any further misunderstandings and, above all, further delays, I would suggest that my brother-in-law, Mr. Navon should come over to Chicago with our lawyer Mr. Stuart Marks, of Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York. This way a preliminary agreement on the principles of the deal can be concluded, leaving legal and other details to the experts.

Although Mr. Navon has my power of attorney to sign and conclude any agreement I could, if you so wish, come over on shortest notice for signature.

With best wishes,

Sincerely yours,
/s/ *Scherk*

EXHIBIT B TO LAVIN AFFIDAVIT

F. Scherk, A rue Heum Speiss, 1208 Geneve, Suisse
Hopital Cantonal Sect. B9, Geneve

Dear Mr. Lavin, 9-6-69

(Please excuse my handwriting; I am writing in bed after 2 surgical interventions.)

It is more than a year that we last met at Melrose Park to agree upon a transaction which will now, at long last, come to its closing.

It was, then, both our feeling and conviction that any final decision was to be taken by two men chiefly concerned and responsible: you and me.

I still agree to that conception and I do regret—to some important measure—that, during this long year of negotiations, we did not personally conduct the procedure leading to the final act of closing of a deal, which not only is the closing of a past but an opening of a future. A future full of both personal and impersonal prospects, as we hope, —this hope being the motivation for the deal itself.

Exhibit B to Lavin Affidavit

I am, now, informed, that "closing" will take place around the 17th June, here in Geneva and be effectuated by the lawyers of both sides. This may (or not) be an "American way" of procedure and it might also be your personal attitude when you acquire a business for your company.

My own view is that such a final act should be performed on the appropriate level of those who initiated it—decided upon it and are the ones deeply responsible. That is, you and me.

It might be my personal wish or even an old European tradition that one hands the key of ones property to the buyer himself. Whatever you may think and even if you felt it to be a nuisance: I wish you to perform the closing with me assisted by those who took great pains and trouble to bring it about and I, therefore, invite you to come to Geneva at a date convenient to everybody in order to close the deal which I was glad to have agreed to at your office one year ago. Personally I believe that I shall be out of hospital within the next 8-10 days, so that this would be fixed on or about the 17th as provided—if it suits you. It could also be in Berlin after the 20th.

I do hope that, again, we agree and that we would, thus, await the future in the same spirit.

Yours sincerely,

F. Scherk

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

AFFIDAVIT OF HAROLD R. JUDELSON

(Filed Nov. 5, 1971.)

Harold R. Judelson, being first duly sworn, on oath deposes and say that:

1. I am the Vice President, International Division, of Alberto-Culver Company (hereinafter called "Alberto"), a Delaware corporation, with its principal place of business in Melrose Park, Illinois. I am authorized to make this Affidavit on behalf of Alberto in opposition to the Motion of Fritz Scherk to Dismiss the Complaint of Alberto against him.

2. As Vice President, International Division, of Alberto, I have executive responsibility and direct supervision over all of Alberto's international activities and operations. Alberto's international activities and operations include Firma Ludwig Scherk (hereinafter called "FLS"), a direct branch of Alberto; Scherk Etablissement Vaduz (hereinafter called "SEV"), a wholly owned subsidiary of Alberto; and Lodeva Herstellung und Vertrieb Kosmetischer Artikel GMBH (hereinafter called "Lodeva"), also a wholly owned subsidiary of Alberto.

3. FLS combines what had been the business of that concern when conducted by Fritz Scherk, since reorganized, modernized, developed, and conducted by Alberto, and Alberto's direct German operations. After the acquisition, the operations, including machinery and equipment, fixtures, inventories, administrative, sales, and manufacturing personnel, agencies, and other aspects of the businesses were consolidated. SEV operates as a trademark

holding company and funnel for the collection of royalties, such as they are, from the sale of products in various countries and as a service to licensees for the promotion of Alberto and Scherk products in those countries. Lodeva is and has been since the acquisition an entirely dormant German corporation.

4. Since the acquisition, the business policies and procedures for the management and operation of FLS and SEV have been made in Melrose Park, Illinois. Direction, supervision, control, functional authority and responsibility in the areas of administration, production, purchasing, marketing, finance and accounting, and formulations, laboratory and technical activities reside with and have been exercised by responsible executives under my management in Melrose Park.

5. Among the activities conducted in Melrose Park in connection with FLS and SEV, since the acquisition, have been the following: development, detailed direction and supervision of administrative and accounting procedures, systems and methods, actual control of capital expenditures (over $2,000.00) and other such contractual commitments, appointments and approval of agencies and consultants, employment of and compensation approval for certain employees, budget review and modification, decisions on resource allocation; marketing decisions and extensive and continuous management, planning and assistance concerning product and territory sales activities, promotion, advertising, market research, brand reviews, product elimination and new product development; creation and formulation and reformulations of many products, frequent research and development, packaging design, quality control specifications and procedures, and other technical activities.

6. In the course of these activities, materials and products, including equipment and materials for testing, quality control and technical purposes, designs, films, advertising sheets, merchandising materials, marketing brochures, raw material and product samples, forms, records and reports, a constant interchange of information and management papers, have been transferred between Melrose Park and Germany.

7. As contemplated by the acquisition agreements, products emanating from the Scherk business have been advertised and promoted within the United States and products produced according to the Scherk product and packaging concepts have been manufactured, marketed and sold by Alberto within this country. Alberto products, created, formulated and developed within this district, have also been manufactured, marketed, sold and Alberto trademarks for these products licensed by Alberto through its FLS and SEV operations abroad.

8. Since the acquisition there have been communications between Fritz Scherk and Alberto in Melrose Park about the acquisition transaction and the business, and Fritz Scherk has come to Melrose Park, Illinois. Mr. Scherk came to Melrose Park in March 1970, and I met with him then, at which time the notes by which Alberto's performance under the transaction agreements was to be made, the business and consultation by Scherk in connection with the business were discussed.

9. True and correct copies of the notes as attached to the transaction agreements and found in the files of Alberto International Division, together with a receipt signed by Fritz Scherk on June 18, 1969, are attached hereto as Exhibits A-E.

Exhibit A to Judelson Affidavit

10. Alberto is a publicly-held corporation and its stock is traded on the SEC regulated New York Stock Exchange. I am generally familiar with the amount of outstanding Alberto common stock held by a number of major shareholders residing in Cook County, Illinois, and can state that a large percentage of Alberto common stock presently outstanding is held by residents within this United States judicial district.

/s/ *Harold R. Judelson*
Harold R. Judelson

(Jurat omitted in printing.)
(Certificate of Service omitted in printing.)

EXHIBIT A TO JUDELSON AFFIDAVIT

June 18, 1969

Received from AC

Check for D M 1,080,360
4 promissory notes (in
accordance with June 16
Closing Agremt.)
/s/ *Fritz Scherk*

EXHIBIT B TO JUDELSON AFFIDAVIT

PROMISSORY NOTE

Melrose Park, Illinois
June 17, 1969

FOR VALUE RECEIVED the undersigned, ALBERTO-CULVER COMPANY, promises to pay to the order of FRITZ SCHERK at .....,
Geneva, Switzerland, the principal sum of DM Two Million Four Hundred Thousand (DM 2,400,000) on June 17, 1976, and to pay interest on the amount of said principal from time to time remaining unpaid, at said address, at the rate of seven percent (7%) per annum from the date hereof until the principal is fully repaid, payable quarterly on the last day of September, December, March, and June.

This note is subject to prepayment at any time in whole or in part without penalty.

This Note may be declared due prior to its expressed maturity, and without notice, in the event of default in the payment of interest within thirty days after the same shall become due.

Alberto-Culver Company is authorized to withhold tax from interest payable hereunder in accordance with the United States Internal Revenue Code and applicable treaties.

This Note is subject to the following provisions of an Agreement dated February 12, 1969 between Fritz Scherk and Alberto-Culver Company:

Exhibit B to Judelson Affidavit

"Section 1.2

. . .

(b) . . .

(i) . . . Such note may be negotiated with the approval of AC, such approval to be withheld only if AC has reason to believe that the note may directly or indirectly be sold or transferred (A) to an entity competitive with AC or (B) to a person described in Section 1000.324(e)(4) of the United States Foreign Direct Investment regulations within three (3) years after the date of closing or such shorter period, if any, as may be specified in any amendments to such regulations. Approval is hereby granted for the negotiation of said note to a European branch of a United States commercial bank, provided Seller advises Alberto-Culver Company of such negotiation."

"Section 9.6

"In the event that at any time prior to March 31, 1976 the DM is revalued upward in relation to the United States dollar by action of the German Government or any agency or instrumentality thereof (referred to in this Section as an 'upward revaluation' of the DM), the amounts payable by AC shall be adjusted so that the proceeds to Seller, computed in United States dollars, shall be the same as if no such revaluation had taken place. A devaluation of the United States dollar not accompanied by an upward revaluation of the DM, shall not be deemed an upward revaluation for purposes of this Section. A devaluation of the United States dollar accompanied by an upward revaluation of the DM shall be deemed to be an upward revaluation of the DM, but only to the extent of such upward revaluation of the DM."

Exhibit C to Judelson Affidavit

This note is deemed to be a contract made under the laws of the State of Illinois and shall be governed by such laws for all purposes.

ALBERTO-CULVER COMPANY

By .....

Vice President

EXHIBIT C TO JUDELSON AFFIDAVIT

TEMPORARY PROMISSORY NOTE

Melrose Park, Illinois
June 17, 1969

FOR VALUE RECEIVED the undersigned, ALBERTO-CULVER COMPANY, promises to pay to the order of FRITZ SCHERK at .....,
Geneva, Switzerland, the principal sum of DM Two Hundred Sixty-Six Thousand Six Hundred Sixty-Six (DM 266,666) on June 17, 1976, and to pay interest on the amount of said principal from time to time remaining unpaid, at said address, at the rate of seven percent (7%) per annum from the date hereof until the principal is fully repaid, payable quarterly on the last day of September, December, March, and June.

This note is issued pursuant to the provisions of Section 1.2(b)(ii) of an Agreement dated February 12, 1969 between Fritz Scherk and Alberto-Culver Company, is subject to such Agreement and is temporary and non-negotiable. On June 17, 1970, it shall be surrendered to Alberto-Culver Company in exchange for a new promissory note in the manner set forth in Section 1.2(b)(ii) of such Agreement. This note is also subject to Section 9.6 of such Agreement which states:

Exhibit C to Judelson Affidavit

"In the event that at any time prior to March 31, 1976 the DM is revalued upward in relation to the United States dollar by action of the German Government or any agency or instrumentality thereof (referred to in this Section as an upward revaluation of the DM), the amounts payable by AC shall be adjusted so that the proceeds to Seller, computed in United States dollars, shall be the same as if no such revaluation had taken place. A devaluation of the United States dollar not accompanied by an upward revaluation of the DM, shall not be deemed an upward revaluation for purposes of this Section. A devaluation of the United States dollar accompanied by an upward revaluation of the DM shall be deemed to be an upward revaluation of the DM, but only to the extent of such upward revaluation of the DM."

Alberto-Culver Company is authorized to withhold tax from interest payable hereunder in accordance with the United States Internal Revenue Code and applicable treaties.

This note is deemed to be a contract made under the laws of the State of Illinois and shall be governed by such laws for all purposes.

ALBERT-CULVER COMPANY

By .....

Vice President

EXHIBIT D TO JUDELSON AFFIDAVIT

TEMPORARY PROMISSORY NOTE

Melrose Park, Illinois
June 17, 1969

FOR VALUE RECEIVED the undersigned, ALBERTO-CULVER COMPANY, promises to pay to the order of FRITZ SCHERK at .....,
Geneva, Switzerland, the principal sum of DM Two Hundred Sixty-Six Thousand Six Hundred Sixty-Six (DM 266,666) on June 17, 1976, and to pay interest on the amount of said principal from time to time remaining unpaid, at said address, at the rate of seven percent (7%) per annum from the date hereof until the principal is fully repaid, payable quarterly on the last day of September, December, March and June.

This note is issued pursuant to the provisions of Section 1.2(b)(ii) of an Agreement dated February 12, 1969 between Fritz Scherk and Alberto-Culver Company, is subject to such Agreement and is temporary and non-negotiable. On June 17, 1971, it shall be surrendered to Alberto-Culver Company in exchange for a new promissory note in the manner set forth in Section 1.2(b)(ii) of such Agreement. This note is also subject to Section 9.6 of such Agreement which states:

> "In the event that at any time prior to March 31, 1976 the DM is revalued upward in relation to the United States dollar by action of the German Government or any agency or instrumentality thereof (referred to in this Section as an upward revaluation of the DM), the amounts payable by AC shall be adjusted so that the proceeds to Seller, computed in United

States dollars, shall be the same as if no such revaluation had taken place. A devaluation of the United States dollar not accompanied by an upward revaluation of the DM, shall not be deemed an upward revaluation for purposes of this Section. A devaluation of the United States dollar accompanied by an upward revaluation of the DM shall be deemed to be an upward revaluation of the DM, but only to the extent of such upward revaluation of the DM."

Alberto-Culver Company is authorized to withhold tax from interest payable hereunder in accordance with the United States Internal Revenue Code and applicable treaties.

This note is deemed to be a contract made under the laws of the State of Illinois and shall be governed by such laws for all purposes.

ALBERTO-CULVER COMPANY

By .....

Vice President

EXHIBIT E TO JUDELSON AFFIDAVIT

TEMPORARY PROMISSORY NOTE

Melrose Park, Illinois
June 17, 1969

FOR VALUE RECEIVED the undersigned, ALBERTO-CULVER COMPANY, promises to pay to the order of FRITZ SCHERK at .....,
Geneva, Switzerland, the principal sum of DM Two Hundred Sixty-Six Thousand Six Hundred Sixty-Six (DM 266,666) on June 17, 1976, and to pay interest on the amount of said principal from time to time remaining unpaid, at said address, at the rate of seven percent (7%) per annum from the date hereof until the principal is fully repaid, payable quarterly on the last day of September, December, March, and June.

Exhibit E to Judelson Affidavit

This note is issued pursuant to the provisions of Section 1.2(b)(ii) of an Agreement dated February 12, 1969 between Fritz Scherk and Alberto-Culver Company, is subject to such Agreement and is temporary and non-negotiable. On June 17, 1972, it shall be surrendered to Alberto-Culver Company in exchange for a new promissory note in the manner set forth in Section 1.2(b)(ii) of such Agreement. This note is also subject to Section 9.6 of such Agreement which states:

> "In the event that at any time prior to March 31, 1976 the DM is revalued upward in relation to the United States dollar by action of the German Government or any agency or instrumentality thereof (referred to in this Section as an upward revaluation of the DM), the amounts payable by AC shall be adjusted so that the proceeds to Seller, computed in United States dollars, shall be the same as if no such revaluation had taken place. A devaluation of the United States dollar not accompanied by an upward revaluation of the DM, shall not be deemed an upward revaluation for purposes of this Section. A devaluation of the United States dollar accompanied by an upward revaluation of the DM shall be deemed to be an upward revaluation of the DM, but only to the extent of such upward revaluation of the DM."

Alberto-Culver Company is authorized to withhold tax from interest payable hereunder in accordance with the United States Internal Revenue Code and applicable treaties.

This note is deemed to be a contract made under the laws of the State of Illinois and shall be governed by such laws for all purposes.

ALBERTO-CULVER COMPANY

By .....

Vice President

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

ORDER

Date November 9, 1971

• • •

Leave is granted to Defendant to file Answer to interrogatories instanter. Defendants given thirty days to file reply brief. Order Cause continued to December 16, 1971 at 10:00 A.M. for decision.

W. J. L.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
(Title omitted in printing.)

MOTION FOR PRELIMINARY INJUNCTION RESTRAINING PROSECUTION OF ARBITRATION INSTITUTED BEFORE THE INTERNATIONAL CHAMBER OF COMMERCE

(Filed Nov. 22, 1971.)

Plaintiff Alberto-Culver Company, a Delaware corporation, by Francis J. Higgins, its attorney, respectfully moves this Court for a preliminary injunction enjoining and restraining the defendant Fritz Scherk, pending the final hearing and adjudication of this action, from prosecuting a certain arbitration proceeding heretofore instituted by him before the Court of Arbitration of the International Chamber of Commerce in Paris, France.

As grounds for this Motion, plaintiff represents:

1. Plaintiff filed this action on June 11, 1971, against the defendant Fritz Scherk seeking relief under the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq., and Rule

10b-5 of the Securities and Exchange Commission, as well as the common law, for the defendant's false and fraudulent misrepresentations and omissions in connection with the sale by defendant to plaintiff of certain securities.

2. In response to the Complaint, the defendant filed a Motion to Dismiss or Alternatively to Stay supported by a brief, and the plaintiff filed an answering brief on November 5, 1971. On November 9, 1971, after having received the plaintiff's brief, the defendant instituted arbitration proceedings against the plaintiff before the Court of Arbitration of the International Chamber of Commerce in Paris, France. Those proceedings were filed while this Court had under advisement the jurisdictional issues raised by defendant as well as the plaintiff's request in the Complaint that any such arbitration proceeding be enjoined. On the following day, November 10, 1971, without disclosing to the Court or to the plaintiff that such proceedings had been instituted, the defendant obtained a thirty day extension of time in which to file his reply brief and a deferral of the date set by the Court for ruling on the pending motion. Pursuant to the Rules of the Court of Arbitration, plaintiff is required to respond to the Request for arbitration on or before December 15, 1971. As a result of the deferral of the Court's ruling date to December 16, 1971, obtained by Scherk after the arbitration proceedings had been instituted, the plaintiff will be required to respond in Paris before such ruling date.

3. The matters placed in issue by the defendant in the arbitration arise out of the same transaction as and are virtually identical to those raised in the Complaint herein and are such that the defendant must assert them by way of defense or counterclaim in this action. A copy of the Request for arbitration as served upon the plaintiff on November 15, 1971, plus an English translation, as well

as a copy of the Rules of Conciliation and Arbitration of the International Chamber of Commerce, are attached hereto and made a part hereof as Exhibits A, B and C.

4. The arbitration provision asserted by the defendant in its Request for arbitration is void and unenforceable under Section 29 of the Securities Exchange Act of 1934, 15 U.S.C. §78cc. See, *Wilko* v. *Swan,* 346 U.S. 427 (1953) and other authorities cited at pages 40-42 of plaintiff's Brief in opposition to defendant's Motion to Dismiss or Alternatively to Stay.

5. Jurisdiction of this cause is based on Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78aa. Service upon the defendant has been made pursuant to Rule 4(e) and (i) of the Federal Rules of Civil Procedure and return of service has been made to this Court.

6. The false and fraudulent misrepresentations and omissions were made by the defendant to the plaintiff in this district.

7. By reason of the foregoing, this Court has complete and exclusive jurisdiction of the subject matter and of the parties under Section 27 of the Securities Exchange Act, 15 U.S.C. §78aa, and venue is properly laid in this district.

8. Unless defendant is restrained by this Court, he will continue to prosecute the arbitration in Paris, France, thereby preempting this Court's exclusive jurisdiction under the Securities Exchange Act and Rule 10b-5, interfering with this Court's control over the progress and orderly procedure of this cause, and creating the danger of conflicting adjudications of the matters at issue. The plaintiff will be further subjected to the vexation and economic waste arising from unnecessary concurrent and duplicative litigation with the same party over the same issues in Chicago and in Paris. In addition, any adjudication by

an arbitrator in Paris against the plaintiff, although void and unenforceable under United States law, will threaten the plaintiff with attempted enforcement proceedings in foreign jurisdictions which may give it recognition. Such action by the defendant, unless enjoined, will result in irreparable damage, loss and injury.

9. The issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendant but will preserve and enforce the jurisdiction of this Court to adjudicate all matters in controversy between the parties.

WHEREFORE, plaintiff requests that the Court issue herein a preliminary injunction enjoining and restraining the defendant Fritz Scherk, pending the adjudication of this action, from prosecuting the arbitration proceeding instituted by defendant against plaintiff before the Court of Arbitration of the International Chamber of Commerce in Paris, France.

ALBERTO-CULVER COMPANY,
a Delaware Corporation,
/s/ *Francis J. Higgins*
Francis J. Higgins
One of Its Attorneys

Of Counsel:
BELL, BOYD, LLOYD, HADDAD & BURNS
135 South LaSalle Street
Chicago, Illinois 60603
ANdover 3-1131
LAWRENCE, GOLDBERG, LAWRENCE & LEWIN
209 South LaSalle Street
Chicago, Illinois 60604
FR 2-1947

(Certificate of service omitted in printing.)

Exhibit B to Motion for Preliminary Injunction

EXHIBIT B

Translation Paris, November 9, 1971

INTERNATIONAL CHAMBER OF COMMERCE
ARBITRATION COURT
REQUEST

FOR: Mr. Fritz Scherk, domiciled in Geneva—1208 (Switzerland), 8 Rue Pedro Meylan, a German Citizen, hereafter called "Fritz Scherk"

Plaintiff

represented by Mr. Jacques KAM, Attorney at the Paris Court

AGAINST: Alberto-Culver Company, a corporation organized under the laws of the State of Delaware (USA), located and doing business at 2525 Armitage Avenue, Melrose Park, Illinois 60160, in the person of its legal representatives, hereinafter called "Alberto-Culver",

Defendant.

(Note of translator: Page 2 of the request is missing)

The price agreed upon, noted in section 1.2 of the Lodeva contract was an amount of German Marks 20,000, payable according to the schedule mentioned under B.

3. *By means of a contract dated February 12, 1969* (hereinafter called "Contract SEV" Fritz Scherk granted Alberto-Culver an irrevocable option for the purchase by AC, against several charges, clauses and conditions listed in said contract (see exhibit C) of the shares of a corporation to be organized under the laws of Liechtenstein (hereinafter called "AG") which he agreed to organize in ac-

cordance with said contract and which corporation would own the assets of Scherk Etablissement Vaduz (hereinafter called "SEV"), a corporate person of the Principality of Liechtenstein, as described in Article I, section 1.1 of the SEV contract.

The total price agreed upon in case of cancellation of the option, as described in paragraph 1 of article 1, sec. 1.2 of SEV contract was DM 8,200,000, of which DM 600,000 was to be paid in cash without restriction for the revision foreseen in said article and especially in sec. 1.7, the difference payable in installments; according to the conditions hereafter discussed under B.

4. In order to allow the formation of AG and to guarantee the transfer of the shares of AG to AC, the SEV contract provided for an escrow (Article 1, sec. 1.3 of SEV contract).

This disposition was put into effect through the signature of an Escrow Agreement of February 12, 1969 (hereinafter called "Escrow Agreement", enclosed as Exhibit D).

5. Finally, on February 11, 1969, a Consulting Agreement between AC and Fritz Scherk was signed (hereinafter called "Consulting Agreement" enclosed as Exhibit X), according to which Fritz Scherk was employed as a Consultant by AC for a period from April 1, 1969 to December 31, 1971, against payment of a lump sum of DM 1,000,000 and of a yearly salary of DM 4,000.

B—PAYMENT OF THE PRICE FIXED BY THE CONTRACTS

The payment of the cash part of the price was to occur after the signature of a new contract (hereinafter called "Closing Agreement"), the date of which was provided

for through the original contracts (FLS and Lodeva contracts, article I, sec. 1.3 and SEV contract, article I, sec. 1.5), according to a mechanism often used by American Corporations for the acquisition of industrial interests.

Concerning in particular the contract SEV, it should be remembered that it is question of an option.

The option having been exercised by AC, the cash part off the price (DM 600,000 without restriction for the revision foreseen in article I, sec. 1.7) became due at the date of the signature of the Closing Agreement.

As for the instalment part of the price, according to the terms of Article I, sec. 1.2(b) of the SEV contract, it was to be covered by four promissory notes signed by AC to the order of Fritz Scherk.

These promissory notes, with an interest rate of 7%, were to be presented for payment only after a period of 7 years from date of the signature of the Closing Agreement.

One only of these promissory notes (for an amount of DM 2,400,000 without restriction of reduction in the conditions provided in article I, section 1.8 of the contract) was negotiable as soon as in possession of Fritz Scherk, but only with the agreement of AC (article I, sec. 1.2 (i)).

The other three promissory notes, as per the terms of article I, sec. 1.2 (ii) were not negotiable, but only exchangeable through AC (at the expiration of a period of two, three and four years, respectively, from the date of the Closing Agreement) against new promissory notes for amounts which could be less than the amounts of the original promissory notes, under the conditions foreseen in article I, sec. 1.9 of the SEV contract, and the negotiability of which could be limited by the same restrictions as those mentioned for the first promissory note.

Exhibit B to Motion for Preliminary Injunction

The Closing Agreement, as foreseen by the above mentioned provisions of the different contracts, was signed by AC and Fritz Scherk on June 16, 1969.

As a result of this Agreement (hereinafter enclosed as exhibit E) which made effective the realization of the different contracts between the parties while adding some minor changes (without interest for this issue), Fritz Scherk received in payment a total amount of DM 2,080,360 made up of the following:

—contract FLS	DM	980,000
—contract LODEVA	DM	20,000
—contract SEV (after revision and deduction of certain amounts on the price)	DM	80,360
—Consulting Agreement	DM	1,000,000
Total	DM	2,080,360

Fritz Scherk also duly received the four promissory notes from AC according to the above conditions, covering the part of the price payable by instalment.

On the other hand, AC became owner of several assets and rights the transfer of which had been agreed upon.

• • •

CHAPTER III—CONCLUSION

Fritz Scherk, for the grounds discussed above and any other grounds to deduct or substitute, concludes that the Court shall:

1. Declare that AC has rescinded the contracts unilaterally on March 31, 1970.

2. Declare that this rescission was not founded.

Exhibit B to Motion for Preliminary Injunction

3. Give credit to Fritz Scherk for his repeated offer to restore to AC the entirety of the amounts and promissory notes received in execution of the contracts.

4. Declare that the rescission decided by AC and the offer of restitution made by Fritz Scherk compelled AC to make restitution spontaneously and immediately of the assets and rights received by them in execution of the contracts.

5. Consequently enjoin AC to return the said assets and rights and this under a daily penalty of DM 100,000.

6. Enjoin AC to complete the restitution by paying the amount of DM 2,500,000 as damages for the prejudice caused by the delay in making restitution.

7. As an alternative, if, as seems impossible, the Court would not order the restitution as requested by Fritz Scherk in paragraph 5 and 6 above, enjoin AC to restitute in the form of damages an amount, except to be completed of DM 199,998 plus interests, representing the promissory notes not paid by AC, increased by DM 2,500,000 as compensation for the prejudice caused by AC's delay to restore.

8. Enjoin AC to pay all the expenses of the arbitration, which will include namely the fees of the arbitrators, and all the related costs.

Under all reservation,

Made in Paris, November 9, 1971
in 3 copies.

Transcript of Proceedings of Monday, November 22, 1971

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
(Title omitted in printing.)

[1] TRANSCRIPT OF PROCEEDINGS had at the hearing * * * on Monday, November 22, 1971, at the hour of 10:00 o'clock a.m.

Present:

Messrs. Bell, Boyd, Lloyd, Haddad & Burns, by Mr. Francis J. Higgins,

and

Messrs. Lawrence, Goldberg, Lawrence & Lewin, by Mr. A. Charles Lawrence,

on behalf of plaintiff;

Messrs. Jenner & Block, by Mr. Robert F. Hanley,

on behalf of defendant.

* * *

[9] The Court: That is what I said earlier in the hearing, and that is why I asked Mr. Scherk—is that the way you pronounce it?

Mr. Hanley: Scherk, yes, your Honor.

The Court: Scherk is a defendant here and counsel has filed an appearance. I have personal jurisdiction at the moment. I may have to decide it otherwise as we get down to December—what is it?

Mr. Higgins: Your ruling date is now December 16, which is three days after our return date in Paris.

The Court: Now, counsel, why don't you—you have a right to have your say.

Mr. Hanley: Yes, your Honor. We had nothing to do with bringing this action. These parties agreed to dispose of their issues, any issues between them, any disputes between them by arbitration.

The only issue that is really pending between these parties is the manner in which they should go about effectuating a rescission of an acquisition of our company—our client's three companies—by Alberto-Culver. They had agreed to do this in Paris.

• • •

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
(Title omitted in printing.)

AFFIDAVIT
(Filed Nov. 24, 1971.)

STATE OF NEW YORK)
) ss
COUNTY OF NEW YORK)

Stuart Marks, being duly sworn, says:

1. I am an attorney duly authorized to practice in the State of New York and as such have represented Mr. Fritz Scherk, named as defendant herein.

2. In April and May, 1970, I visited attorneys representing Alberto-Culver in Chicago for the purpose of discussing the disputes involved herein and attempting to work out a settlement of them. A. Lawrence Goldberg, Esq., whom I understand to be special counsel (and now a director) of Alberto-Culver, participated in these con-

ferences and stated that if we could not arrive at a settlement, why then we would have to arbitrate in Paris, but that this would not be too unpleasant. He mentioned the fact that his wife had been born in Europe and that spending time in France would be no hardship.

3. In December, 1970, Mr. Scherk instituted a proceeding in Berlin for the purpose of preventing the removal from Berlin to Braunschweig of the Scherk business, which he was seeking to have Alberto-Culver restore to him. The Berlin court, in denying the relief sought, stated, among other things (page 9 of its opinion):

> "The application, agreed upon by the parties, of the law of the State of Illinois does not refer alone, as the plaintiff believes, to the decision of the arbitrator in accordance with Article IX, paragraph 4 of the purchase agreement of February 11, 1969. Arbitral decision is prescribed for the case of differences of opinion over claims arising out of the contract and of breach thereof. The establishment of the asserted defects in trademarks and the consequences thereof also is submitted to the decision of the arbitrator."

4. In a brief opposing preservational relief sought by Mr. Scherk in Liechtenstein against a wholly-owned subsidiary of Alberto-Culver, Dr. Peter Ritter, the Liechtenstein lawyer representing the wholly-owned subsidiary of Alberto Culver, stated:

> "(a) In this provision [Section 9.4 of the agreements of February 11 and 12, 1969] Fritz Scherk and the Alberto-Culver Company agreed, viz., on the exclusive jurisdiction, for all controversies or claims arising out of this contract or its breach, of the International Chamber of Commerce, Paris, France, as arbitral court. It is very questionable whether a judicial preservation proceeding [Sicherungsverfahren] is at all permissible when the basic claim can be decided only by the arbitral tribunal, so that as a prac-

tical matter, the justificatory complaint underlying the preservation decree [Sicherungsbot] could be initiated only in this arbitral court. This is, as mentioned, questionable if either a local court or a local arbitral court were to be occupied with the matter.

"(b) But such a preservation proceeding is absolutely inadmissible if the principal claim can be established only in a foreign arbitral court, whose decree is not enforceable locally. A decree of a French arbitral court is denied direct enforceability in Liechtenstein. The plaintiff bases his preservation claim on his claims against Alberto-Culver. These claims can be established only, as mentioned, in a French arbitral court. "For this reason the present preservation proceeding is inadmissible, as a consequence of lack of jurisdiction or inadmissibility". (Page 18)

5. The first steps for instituting the arbitration proceeding recently commenced in Paris by Mr. Scherk were taken in January, 1971, but the actual filing of the papers was delayed by difficulties of communication between the numerous countries involved.

/s/ *Stuart Marks*
Stuart Marks

(Jurat omitted in printing.)

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

ORDER

Date: November 24, 1971

Enter order of preliminary injunction enjoining the defendant, Fritz Scherk, from further prosecuting the arbitrator proceeding before the Court of Arbitration of the International Chamber of Commerce pending decision of this Court as to its jurisdiction (draft).

Order plaintiffs bond set at $5,000.00.

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

(Title omitted in printing.)

ORDER FOR PRELIMINARY INJUNCTION

This cause coming on to be heard upon the Motion of plaintiff, Alberto-Culver Company, for a preliminary injunction restraining the defendant, Fritz Scherk, from prosecuting an arbitration proceeding instituted by defendant before the Court of Arbitration of the International Chamber of Commerce in Paris, France and the Court, having considered the pleadings, briefs of both parties and the affidavits and exhibits of record and having heard the argument of counsel for both parties:

THE COURT FINDS that:

1. The defendant has filed a Motion to Dismiss or Alternatively to Stay, supported by a brief and affidavits, which is currently under advisement by this Court. Plaintiff has filed a brief and affidavits in opposition to the motion. Said motion is set for ruling on December 16, 1971.

2. After the commencement of this action, the defendant has instituted arbitration proceedings before the Arbitration Court of the International Chamber of Commerce in Paris, France and those proceedings involve the same matters that are before this Court in this action.

3. This Court has the jurisdiction to determine its own jurisdiction and in aid thereof the Court has the power to restrain the defendant from prosecuting the arbitration proceeding pending the determination of this Court's jurisdiction:

IT IS HEREBY ORDERED that the defendant, Fritz Scherk, is enjoined and restrained from further prosecuting the arbitration proceeding which he has filed before the

Court of Arbitration of the International Chamber of Commerce pending the determination by this Court of its jurisdiction of this action.

Dated: November 24, 1971

/s/ William J. Lynch
William J. Lynch, Judge

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

(Title omitted in printing.)

REPLY AFFIDAVIT OF FRITZ SCHERK

(Filed Dec. 8, 1971.)

STATE OF SWITZERLAND)
) SS
CITY OF GENEVA)

Fritz Scherk, being first duly sworn on oath, deposes and says that:

1. When negotiations were resumed in Berlin in January and February 1968 on the initiative of Mr. Nadler and Mr. Meading on behalf of Alberto-Culver, the basis of the discussions was for the purchase of all my businesses including SEV. They were held in preparation of Mr. Lavin's visit to Berlin, at which the sale of all my commercial holdings to Alberto-Culver was to be finally and definitely decided upon. At Mr. Lavin's visit to Berlin, March 1968, he and I—in the presence of Mr. Nadler and Mr. Navon—reached full agreement upon the basic terms of this transaction, the sales-price and modalities of its payment, and decided definitely on it. As Mr. Lavin did not wish to buy my factory's land and premises at Berlin,

Kelchstr. 31, but rather have it leased to Alberto-Culver and as I wished to keep the Israel Scherk-business, these assets were excluded from sale, which, otherwise, covered all my international commercial rights, properties, assets and my name.

Immediately after agreement had been reached, Mr. Lavin called Mr. Friedel at the Alberto-Culver offices at Melrose Park over the Telephone and informed him, that he just had bought all the international Scherk-businesses– "but not the bricks"—"for U$ 2.150.000,00 as is, lock stock and barrel" and that he thought that this was a good deal.

Mr. Friedel replied that he thought so too and that Mr. Lavin had done a good job.

Mr. Lavin then demanded from me that I cease and terminate any and all negotiations for the sale of my businesses with other prospective buyers, I was then conducting, as Alberto-Culver was, now, definitely "the buyer". We, then, brought Mr. Lavin to the Berlin airport where, with a symbolic handshake, the deal was solemnized.

2. Subsequent to that Berlin-meeting of March 1968 on the sale of my businesses to Alberto-Culver, divergencies of opinion arose as to the interpretation and computation of the sales-price's payment modalities in relation with non-cash and contingencies payments. This matter was extensively discussed in Berlin and London with Mr. Nadler, Chief negotiator of Alberto-Culver through-out until the final closing. Mr. Nadler, stating that only Mr. Lavin personally could and would decide on such a matter relating to a transaction he himself had decided upon, suggested a personal meeting between Mr. Lavin and me, at which this problem, surely, would resolved.

It was in reply to Mr. Lavins letter of April 9, 1968 that I wrote my letter of April 30, 1968 to Mr. Lavin (Exhibit A, Lavin-affidavit), and shortly afterwards, in the morning of May 7, 1968, I received a telegramm from my legal counsel Mr. Stuart Marks, from New York, reading as follows:

> LAVIN HAS WRITTEN SCHERK SUGGESTING MEETING UNITED STATES STOP I TENTATIVELY ARRANGED WITH HIM FOR MORNING MAY TWENTYSECOND STOP LAVIN FEELS SCHERK SHOULD BE PRESENT STOP LETTER FOLLOWS
>
> MARKS

This telegramm or rather a photostat copy of it is attached hereto as EXHIBIT I.

The letter following this telegramm, of May 7, 1968, addressed to my General Representative and Attorney, Mr. Navon, at my Berlin business' adress, from Mr. Marks, is attached hereto as EXHIBIT II. Also in photostat copy.

A meeting to resolve the problem of the divergencies on the payment modalities regarding the sales-price's computation in relation to the non-cash-and-contingencies terms, agreed upon at the March 1968 Berlin meeting was, thereupon, arranged for May 1968 at Melrose Park, Illinois, U.S.A.

3. The meeting at Melrose Park, May 22-25, 1968, at which Mr. Navon and my wife also attended, then settled these divergencies, and in a private meeting with Mr. Lavin alone I agreed upon the modalities and computation of the sales-price's payment under the terms and conditions and in relation with the Promissory Notes and the contingency

which we discussed. Mr. Lavin emphasized during that discussion "under 4 eyes" that, as head of our businesses, only he and I were the men to decide, as we had done in Berlin, when we made the deal. I understood my view with his previous understanding and interpretation of non-cash-and-contingency computation, the agreed upon sales-price would have been substantially reduced, and the settlement brought about by this frank and outspoken discussion was satisfactory to me. It was, again and in the presense also of Mr. Friedel, solomnized with a handshake.

When mentioning, later, that I owned trademarks which I held "in reserve stock" in accordance with the possibilites provided for by the European trademark and patent-right laws, regulations and usances and which were not or little used, Mr. Lavin stated, that what he was interested in was a good brand-name, goodwill, public acceptancy of that, drawing power and sales-development possibilites and that he expected SCHERK and the wide distribution of Scherk-products internationally plus the Scherk-organisations would provide Alberto-Culver with all that and the possibility to develop sales and marketing of Alberto-Culver products in Europe.

When the parsel with copies of all my trademark registrations arrived, airmailed to Melrose Park by my secretary, Mrs. Dorsch, not one of the Alberto-Culver officials, nor Mr. Lavin took a look at them.

4. After the Melrose Park meeting extensive and detailed negotiations ensued in Europe with Mr. Nadler, Mr. Walter Treumann and other authorised agents and experts acting on behalf of Alberto-Culver, such as, for instance, Mr. Jordan, Chief chemist of Alberto-Culver on formulae manufacturing,—Messrs. Peat, Marwick, Mitchell & Co., for

accountancy, finances, computation, calculations and examinations thereto,—Messrs. Pattishall, McAuliffe & Hofstetter and Messrs. Bussmann (of Hamburg) on trademarks, patentrights—?—usances and examinations thereto, ect.;—all in relation to my businesses and their sale to Alberto-Culver. These negotiations and examinations, which were held exclusively in Europe, lasted, practically, until the closing of all the agreements, March, resp. June 1969.

5. The four Promissory Notes were delivered to me at this final closing of the (consolidated) sales-and-other-agreements (Escrow agreement, consultation agreement, FLS & SEV—agreements under the Closing agreement) on June 17 or 18, 1969., in Geneva, Switzerland, by Mr. Walter Treumann and Mr. James Nadler on behalf of Alberto-Culver, and it was there and then, that I signed the receipt of them (Exhibit A of the Judelson Affidavit).

6. "Scherk Etablissement Vaduz" (SEV), under Liechtenstein law was an "Establishment" and not a corporation. I held no shares or securities, but paid in the required capital, so that, when this Establishment was founded, May 25, 1954, I was registered as "Founder", which is also shown in its statutes. It was at the express demand and requirement of Alberto-Culver that, for the purpose of acquiring SEV, I was required to alter the the status of SEV and to form a corporation at the offices of "Prāsidial Anstalt Vaduz", a lawyer firm chosen by Alberto-Culver at Vaduz, Liechtenstein. I, there, signed the documentation put before my by Alberto-Culver's lawyer, Mr. Töndury, so that "Scherk-Enterprises V A.G.", a corporation (Aktiengesellschaft) was founded and "Scherk Etablissement Vaduz", consequently, struck from the Liechtenstein registry. This name was chosen by Alberto-Culver to preserve the well

known abriviation of "S E V". I never was in possession of nor did I see any shares of securities of SEV-A.G., as these, under the Escrow-agreement, were immediately placed under escrow and delivered to Alberto-Culver directly, at the final closing, by the Escrow Agent nominated by them.

7. I deny that the representations on trademarks set forth in the Complaint are false or misleading.

8. Of the persons named in § 12 of the Lavin-Affidavit I know only:

(a) James Nadler
(b) Robert Silver (on December 2, 1971 at Chicago)
(c) Fred Meading
(g) E.C. Friedel
(j) Walter Treumann
(n) Karlheinz Quack, attorney at law in Berlin

9. The price for my German business offered by Mr. Lavin at his meeting with Mr. Navon, at Melrose Park, December 1967, was less than U$ 250.000.

10. The persons who took part, on my behalf, in the negotiations and discussions which preceded the execution of the acquisition agreements and who would, eventually, have to attend or otherwise participate in proceedings on the Complaint are:

Mr. B. Navon, my General Representative and Attorney, Israel
Mr. St. Marks of Kaye, Scholer, Fierman, Hays & Handler, N.Y.
Mr. B. Neubert, lawyer and trademark cousel, Berlin
Dr. H. Bronner, Wirtschaftsprufer, lawyer and finance expert, Berlin
Mr. Stocklossa, of Messrs. Drs. H. Brönner, Berlin

Mr. Kröger, of Messrs. Drs. H. Bonner, Berlin
Dr. H. Fincke, trademark counsel and patent agent, Munich
Mr. Staeger, of Fincke, Bohr & Co. Patent agents, Munich
Mr. Thornton, of Thornton & Thornton, Patent lawyers, London
Mr. A. Eder, tax-and-finance expert. Vienna
Dr. P. Marxer, lawyer, Vaduz
Dr. G. Batliner, lawyer, Vaduz
Mr. Pfundt, lawyer, Berlin
Mr. Lucius of Berliner Handelsgesellschaft, banker, Berlin
Mr. Kohnert of Berliner Discontobank, banker, Berlin
Mr. Bonte of Berliner Industriebank, banker, Berlin
Mr. W. Matthess, owner of Dorland Advertising Agency, Berlin
Mr. H. Beutter, procurist and manager, Scherk Vienna
Mr. Lehrer, sales manager, Scherk Berlin
Mrs. Haas, procurist, Scherk Berlin
Mrs. Dorsch, secretary, Scherk Berlin
Mrs. Kauffmann, Directrice, Scherk Berlin
Mrs. Lesch, manufacturing manager, Scherk, Berlin
—my former employes and responsible officials and such experts as may be required.

/s/ *Fritz Scherk*

(Jurat omitted in printing.)

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISON

(Title omitted in printing.)

AFFIDAVIT OF STUART MARKS

(Filed Dec. 8, 1971.)

STATE OF NEW YORK)
) SS
COUNTY OF NEW YORK)

Stuart Marks, being duly sworn, says:

1. I am an attorney duly authorized to practice in the State of New York and as such have represented Mr. Fritz Scherk named as defendant herein.

2. I attended conferences which took place at the offices of Alberto-Culver in Melrose Park, Illinois between May 22 and 25, 1968 and was present at the conference at which Mr. Scherk discussed his European business with Mr. Lavin, President of Alberto-Culver. Mr. Lavin stated that he was interested in the Scherk business because Alberto-Culver had had difficulty getting its products on to the German market, and Scherk was apparently well known in that market. He stated that he had two ways to get Alberto-Culver products on to the German market: he could either spend the necessary money in advertising and promotion or he could use the Scherk business as a means of launching Alberto-Culver products. He stated that if he took the latter approach, he could afford to pay Mr. Scherk what it would otherwise cost for the advertising and promotion and that if the Scherk business itself turned out to be profitable, he could pay Mr. Scherk a portion of the profits.

There was no mention of trademarks other than Mr. Scherk's brief allusion to the fact that Scherk enterprise

owned marks. The conference was devoted to a discussion of price and Mr. Lavin's own ideas on it, including the explanation given above.

3. I attended a meeting on Sunday, December 8, 1968 in the offices of Pattishall, McAuliffe and Hofstetter, Prudential Plaza, Chicago. The purpose was to discuss various trademark questions raised by Mr. Silver and attorneys in the Pattishall firm, following which I was to go to Europe to obtain further information on this subject. I did not make the statement which Mr. Silver attributes to me in his affidavit of October 1, 1971.

4. The business of Mr. Scherk conducted from Liechtenstein had for many years been operated as an Anstalt (establishment) which did not use negotiable stock or certificates as indicia of ownership, for transfer, or for any other purpose, and at no time had shares outstanding. The attached copy of an extract from the Vaduz Commercial Register, evidencing the existence of the Anstalt (Exhibit A), expressly states that the capital consisted of 10,000 Swiss francs fully paid in cash and not divided into shares. The statutes of the Anstalt (Exhibit B) expressly provide, in Article 5, that the capital of the Anstalt is not and must not be divided into shares. (A translation of the statutes is annexed hereto as Exhibit C).

Article 541 of the Liechtenstein Personen- und Gesellschaftsrecht provides that an Anstalt can have shares and certificates only if its statutes so provide. As I have mentioned above, the statutes of the Scherk Anstalt expressly prohibited the creation of shares. A copy of Article 541 is annexed hereto as Exhibit D, and a translation of Article 541 is annexed hereto as Exhibit E.

5. It was only as a result of the agreement of February 12, 1960, relating to sale of the Liechtenstein business,

that the Anstalt was changed into a stock corporation. This agreement contained a requirement, inserted at the insistence of Alberto-Culver for their tax reasons, that the Anstalt be converted into a stock corporation.

In order to accomplish the transformation, Fritz Scherk entered into an escrow agreement dated February 12, 1969 (Exhibit F) with Alberto-Culver's attorneys (Praesidial-Anstalt Vaduz). In this agreement, Mr. Scherk irrevocably assigned to Alberto-Culver's attorneys all his rights as owner of the Anstalt and he further evidenced this by executing and delivering to Alberto-Culver's attorneys a deed assigning them his ownership of the Anstalt. He also delivered to them a stock power in blank so that when they had completed the transformation, they would have in their hands full ownership of the resulting corporation. The transformation of the Anstalt took place on February 26, 1969.

6. There were four elements in the transactions between Mr. Scherk and Alberto-Culver, namely, a consulting agreement between Alberto-Culver Company and Fritz Scherk dated February 11, 1969 containing a ten-year covenant against competition (to which the agreement assigns a price of DM 1,000,000), the purchase of the Liechtenstein business (referred to above), the purchase of Mr. Scherk's proprietorship in Berlin (including obtaining a lease from Mr. Scherk of the premises in which the Scherk production facilities were located), and the purchase of Lodeva. Lodeva was an inactive company for which Alberto-Culver paid Mr. Scherk DM 20,000 (approximately $5000). Lodeva owned no trademarks.

/s/ *Stuart Marks*
Stuart Marks

(Jurat omitted in printing.)

(Certificate of Service omitted in printing.)

Order

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISON

(Title omitted in printing.)

ORDER

Date: December 22, 1971

The defendant's motion to dismiss is hereby denied. The Court finds that the complaint states a cause of action under the Securities Exchange Act of 1934, 15 U.S.C. §78j. The Court further finds that service of process on defendant, Scherk, was properly effected and that the "minimal contacts" requirement of the due process clause has been satisfied. Therefore, the Court has jurisdiction over both the subject matter of the complaint and over the person of the defendant, Scherk. Further, the Court finds that the doctrine of forum non conveniens is inapplicable to the instant action. Defendant's motion to stay these proceedings pending the pursuit of arbitral remedies before the International Chamber of Commerce is denied. *Wilko* v. *Swan, et. al.*, 346 U.S. 427 (1953). Finally, it is ordered that the plaintiff's claims for punitive damages for alleged violations of the Securities Exchange Act of 1934 be stricken. Defendant is given 20 days to answer or otherwise plead.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISON

(Title omitted in printing.)

MOTION FOR RENEWED PRELIMINARY INJUNCTION RESTRAINING PROSECUTION OF ARBITRATION PROCEEDING

(Filed Jan. 12, 1972.)

NOW COMES the plaintiff Alberto-Culver Company and respectfully moves this Court for an Order of Preliminary Injunction enjoining and restraining the defendant Fritz Scherk, pending the final adjudication of this action, from prosecuting the arbitration procedings heretofore instituted by said defendant against plaintiff before the Court of Arbitration of the International Chamber of Commerce in Paris, France.

In support of this Motion plaintiff alleges that:

1. On November 24, 1971, this Court entered an Order of Preliminary Injunction enjoining and restraining the defendant from prosecuting the Paris arbitration proceedings pending this Court's determination of its jurisdiction.

2. On December 22, 1971, the Court entered its order denying defendant's Motion to Dismiss or Alternatively to Stay and finding that jurisdiction existed over the subject matter of the action and the person of the defendant.

3. Under the Securities Exchange Act of 1934 the Court's jurisdiction of this case is exclusive.

4. The points and authorities supporting this Motion are set forth in plaintiff's Brief in Opposition to defen-

dant's Motion to Dismiss and in plaintiff's Brief in Support of its earlier Motion for Preliminary Injunction.

5. Renewal of the Preliminary Injunction is necessary to protect this Court's exclusive jurisdiction and to prevent defendant from prosecuting the arbitration proceedings which are still pending and which concern the same controversy as that presented here.

Alberto-Culver Company,
Plaintiff
/s/ *Francis J. Higgins*
Francis J. Higgins
Its Attorney

Of Counsel
BELL, BOYD, LLOYD, HADDAD & BURNS
135 South LaSalle Street
Chicago, Illinois 60603
ANdover 3-1131

LAWRENCE, GOLDBERG, LAWRENCE & LEWIN
209 South LaSalle Street
Chicago, Illinois 60604
FR 2-1047

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing.)

[1] TRANSCRIPT OF PROCEEDINGS had in the hearing * * * on Friday, January 14, 1972, at the hour of 10:00 o'clock a.m.

Transcript of Proceedings of January 14, 1972

Present:

Messrs. Bell, Boyd, Lloyd, Haddad & Burns, by Mr. Francis J. Higgins,

and

Messrs. Lawrence, Goldberg, Lawrence & Lewin, by Mr. A. Charles Lawrence,

on behalf of plaintiff;

Messrs. Jenner & Block, by
Mr. Robert F. Hanley and
Ms. Lynn E. McNown,

on behalf of defendant.

• • •

[7] The Court: Except there was a provision in the preliminary injunction that it would fall upon my decision on the question of the jurisdiction of this court.

Mr. Hanley: Right. As far as I'm concerned, there is no—and I think Mr. Higgins agrees—there is no injunction in force at this time. So, he has now filed another motion for preliminary injunction, which has now been briefed and submitted to your Honor. I understood we were going to have—maybe I'm wrong, but I understood we were going to have a further hearing on that on Monday of next week. I guess there was no date.

Mr. Higgins: Your Honor, counsel's statements are of great concern.

If I understand what he's saying now, he is asking your Honor to exercise your discretion not only to certify, which is one issue, but secondly, quite explicitly in his motion, to stay these proceedings here pending this discretionary review by the Court of Appeals, while at the same time say-

ing that he intends to go ahead, or at least that he has the right to go ahead in Paris, simply during that period of delay.

[8] Now, the question of the earlier injunction was fully briefed and argued, and it was issued pending the court's power to determine its jurisdiction. The court ruled that it did have such jurisdiction, so that the question of the present injunction is simply one of updating in the light of the court's December 22, 1971 ruling.

If Mr. Hanley is now saying that he, on the one hand, can tie things up here on a discretionary basis, pending appeal, while prosecuting us in Paris, he is using this procedural device of review to achieve the very thing which the court has held he is not empowered to do.

The Court: Is that what you intend to do, Mr. Hanley?

Mr. Hanley: No, your Honor.

As a matter of fact, he has a motion for preliminary injunction pending. I don't think he is entitled to it. We have made arguments on that point.

The Court: If you say he is not entitled to it, then you intend to proceed in Paris, don't you?

[9] Mr. Hanley: If the Court denies his motion for injunction, we would certainly proceed in Paris.

The Court: All right, that's an honest forthright answer from you.

Mr. Hanley: As we believe we have the right to do under the arbitration clause of the agreement.

The Court: Surely.

• • •

Order

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

(Title omitted in printing.)

ORDER

Date Jan. 14, 1972

Enter order granting defendants motion for Certification to the Circuit Court of Appeals pursuant to 28 U.S.C. sec. 1292(b).

Enter order of preliminary injunction pursuant to the terms of the draft order entered herein. (draft)

Enter order approving preliminary injunction bond in the amount of $7,500. (draft)

/s/ *WJL*

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ALBERTO-CULVER COMPANY, a Delaware corporation, Plaintiff,

v.

FRITZ SCHERK, Defendant.

No. 71 C 1414

ORDER OF PRELIMINARY INJUNCTION

This cause coming on to be heard upon the Motion of plaintiff for a Renewed Preliminary Injunction enjoining defendant from prosecuting arbitration proceedings instituted by him against plaintiff before the Court of Arbi-

tration of the International Chamber of Commerce in Paris, France, and the Court having heard argument thereon and being fully advised in the premises,

DOES FIND:

1. In November, 1971, while this Court was considering defendant's Motion to Dismiss or Alternatively to Stay, defendant instituted arbitration proceedings against plaintiff before the aforesaid International Chamber of Commerce which proceedings involved the same controversy which is before the Court in this case.

2. On November 24, 1971, this Court, after briefing and argument, entered an Order of Preliminary Injunction enjoining the defendant from prosecuting said arbitration proceedings pending this Court's determination of its jurisdiction.

3. On December 22, 1971 this Court entered its order denying defendant's Motion to Dismiss or Alternatively to Stay and finding that this Court has jurisdiction over the subject matter and of the person of defendant.

4. This Court has exclusive jurisdiction of this controversy under the Securities Exchange Act of 1934.

5. It is necessary that an Injunction be issued to protect this Court's jurisdiction of this action and to prevent the irreparable harm which would result from preemption of this Court's exclusive jurisdiction by defendant's proceeding before said International Chamber of Commerce.

IT IS THEREFORE ORDERED that the defendant Fritz Scherk be and he hereby is enjoined and restrained, pending review of this Court's order dated December 22, 1971 by the United States Court of Appeals for the Seventh Circuit, from prosecuting the arbitration proceeding instituted by defendant against plaintiff before the Court of Arbitration of the International Chamber of Commerce in Paris, France. Plaintiff shall post a Preliminary Injunction

Bond in the amount of Seven Thousand Five Hundred Dollars ($7,500.00).

/s/ *William J. Lynch*
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 71 C 1414

ALBERTO-CULVER COMPANY, Plaintiff,

vs.

FRITZ SCHERK, Defendant.

MEMORANDUM OF DECISION

January 17, 1972

(The Memorandum of Decision is printed at pages App. 18 - App. 33 of the Petition For A Writ Of Certiorari.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

(Title omitted in printing.)

AMENDED ORDER

The defendant's motion to dismiss is hereby denied. The Court finds that the complaint states a cause of action under the Securities Exchange Act of 1934, 15 U.S.C. §78j. The Court further finds that services of process on defendant, Scherk, was properly effected and that the "minimal contacts" requirement of the due process clause

has been satisfied. Therefore, the Court has jurisdiction over both the subject matter of the complaint and over the person of the defendant, Scherk. Further, the Court finds that the doctrine of *forum non conveniens* is inapplicable to the instant action. Defendant's motion to stay these proceedings pending the pursuit of arbitral remedies before the International Chamber of Commerce is denied. *Wilko v. Swan, et al.*, 346 U.S. 427 (1953). Finally, it is ordered that the plaintiff's claims for punitive damages for alleged violations of the Securities Exchange Act of 1934 be stricken.

The Court is of the opinion that this order involves controling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order as authorized by 28 U.S.C. §1292(b) may materially advance the ultimate termination of thislitigation. It is ordered that all proceedings herein be stayed pending determination of the appeal of this order by the United States Court of Appeals for the Seventh Circuit.

Dated: January 14, 1972.

Enter:

/s/ *William J. Lynch*
William J. Lynch, Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
(Title omitted in printing.)

NOTICE OF APPEAL

Notie is hereby given that Fritz Scherk, defendant above-named, hereby appeals to the United States Court of Apeals for the Seventh Circuit from the Order Of

Preliminary Injunction entered in this action on the 14th day of January, 1972, and from the Minute Order entered in this action on the 22nd day of December, 1971 which in part denied defendant Scherk's motion to stay proceedings in this action pending arbitration of this matter before the International Chamber of Commerce.
Dated: January 21, 1972.

/s/ *Lynne E. McNown*
One of the Attorneys for Defendant
Fritz Scherk

Jenner & Block
135 South LaSalle Street
Chicago, Illinois 60603
641-6060

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 72-1158

ALBERTO-CULVER COMPANY,
Plaintiff-Appellee,

vs.

FRITZ SCHERK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION

August 2, 1973

(The Opinion is printed at pages App. 1 - App. 17 of the Petition For A Writ Of Certiorari.)

Order

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
August 2, 1973

No. 72-1158

ALBERTO-CULVER COMPANY, a Delaware Corporation,

Plaintiff-Appellee,

vs.

FRITZ SCHERK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

(SEAL)

Order

In the

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

(Title omitted in printing.)

October 18, 1973.

ORDER

On consideration of the petition for rehearing and sug
gestion that it be heard *en banc* filed in the above-entitl
cause, no judge in active service having requested a vo
thereon, nor any judge voted to grant the suggestion, an
all of the members of the panel having voted to deny
rehearing,

IT IS ORDERED that the petition for a rehearing i
the above-entitled cause be and the same is hereby denie

Supreme Court of the United States

No. 73-781

Fritz Scherk,

Petitioner,

v.

Alberto-Culver Company

ORDER ALLOWING CERTIORARI. Filed January 21 ----------, 19 74.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh ----------Circuit is granted.